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71-1504

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

PANOTEX PIPE LINE COMPANY and
CAMERON CRUDE OIL CORPORATION,

Petitioners,

v.

PHILLIPS PETROLEUM COMPANY and
DIAMOND SHAMROCK CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Washington, D. C. THIEL PRESS 202 393-0625

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

This is a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on February 17, 1972.

OPINION BELOW

The opinion of the court below is not yet officially reported and is set forth in the Appendix to this petition, pp. 12a-24a (hereafter referred to as "App.").

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the court below erred in holding in a private antitrust suit that directed verdicts (which were denied at the close of plaintiffs' case) could subsequently be granted at a random point during the presentation of defendants' cases in chief by considering and weighing evidence introduced therein that did not support the plaintiffs' case, where such actions are not supported by 50(a) F.R. Civ. P., or any decisions relating thereto, and do not accord with prior decisions of this Court respecting the proper test to be applied in determining the sufficiency of evidence in passing on motions for directed verdicts.[1]

2. Whether the court below erred in holding that, in order to establish an attempt to monopolize by each defendant, plaintiffs were required to show that there was a "dangerous probability" that such defendant would succeed in achieving a monopoly.

3. Whether an agreement between a large integrated oil company and its pipeline subsidiary, by which the latter is to extend its pipeline on an uneconomic basis for the purpose of securing for itself a monopoly and of excluding a small pipeline from the market, is justifiable on the ground that the parent oil company "need[s] the oil for its refinery."

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[1] Involved herein is the question whether the court below ruled improperly in holding that evidence of conversations between high ranking officials of the two defendant oil companies relating to the prices each would charge and to territories each would enter did not constitute substantial probative evidence of a Sherman Act violation; and whether the court of appeals improperly failed to consider evidence erroneously excluded by the trial court, a part of which evidence the appellate court ruled to be admissible. (Statement of the Case, pp. 9-10, Reasons for Granting the Writ, pp. 12-13, *infra*).

CONSTITUTIONAL PROVISION, STATUTES AND FEDERAL RULE INVOLVED

1. Constitution of the United States:

   Amendment 7, printed at App., p. 25a.

2. United States Code:

   Section 1 of the Sherman Act, 15 U.S.C. §1, printed at App., pp. 25a, 26a.

   Section 2 of the Sherman Act, 15 U.S.C. §2, printed at App., p. 26a.

   Section 4 of the Clayton Act, 15 U.S.C. §15, printed at App., p. 26a.

   Section 16 of the Clayton Act, 15 U.S.C. §26, printed at App., p. 27a.

3. Federal Rules of Civil Procedure
   Rule 50, printed at App., pp. 27a-29a.

STATEMENT OF THE CASE

Petitioners, Cameron Crude Oil Corporation and Panotex Pipe Line Company (hereinafter sometimes referred to as "Cameron-Panotex"), filed suit against Phillips Petroleum Company ("Phillips") and Shamrock Oil and Gas Corporation ("Shamrock"), seeking injunctive relief and treble damages under Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2) and Sections 4 and 16 of the Clayton Act (15 U.S.C. §§15, 26). The defendants and others were charged with having combined and conspired to restrain and to monopolize interstate trade and commerce in the purchase and transportation of crude oil and with having attempted to monopolize the said trade and commerce.[2] Phillips and

[2]See Instrument Number 32 ("Instr. No.") in the Appendix p. 17, before the court of appeals which has been forwarded to the clerk of this Court, referred to as "A". Diamond Shamrock Corporation was subsequently substituted for Shamrock.

Shamrock filed counterclaims which were severed on the final day of trial and are still pending.[3]

At the close of plaintiffs' case, Phillips and Shamrock each filed a motion for a directed verdict.[4] These were denied (A. 829-881). The trial proceeded, with both Phillips and Shamrock introducing evidence. However, during the course of the defendants' case, the court invited Shamrock to resubmit its motion for a directed verdict (A. 1145), which was granted (A. 1154-1155) despite the fact that the trial court had reserved to Cameron-Panotex the right to introduce evidence in rebuttal (A. 1141, 1146). Thereafter, Phillips' motion for a directed verdict was granted (A. 1193-1197).

This case arose out of the steps taken, beginning in 1963, by Cameron to construct a crude oil pipeline (Panotex) which would run from the Panhandle of Oklahoma down through Lipscomb and Hemphill counties in Texas, then back into Oklahoma to a point near Elk City (A. 115-116). Cameron is a small business concern primarily engaged in the purchase, transportation by truck and sale of crude oil. Its subsidiary Panotex is a common carrier crude oil pipeline company.

Defendant Phillips is a major integrated oil company which owns crude oil producing properties, refineries, raw material and petroleum products pipelines and owns and operates service stations (A. 806). One of Phillips' refineries is located at Borger, Texas. Phillips Pipe Line Company ("PPLC"), a wholly-owned subsidiary of Phillips (A. 348-349), was named as a co-conspirator in this proceeding.

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[3]These counterclaims alleged violations of the Sherman Act (Instr. Nos. 41, 58) (*e.g.* A.64), see also (A. 1155, 1196).

[4]Instr. Nos. 117 and 116 (A.75; 70).

Defendant Shamrock, like Phillips, is a large integrated oil company, engaged in oil production, refining and pipeline operations (A. 417-422). Shamrock owns a refinery at McKee, Texas, in the Panhandle field located northwest of Phillips' Borger refinery. Shamrock Pipe Line Corporation, a wholly-owned subsidiary of Shamrock, was named as a co-conspirator.

At the time in 1963-1964 that Cameron was arranging to finance and to construct its pipeline, Phillips and Shamrock had pipelines in the area of their Texas refineries but neither had extended its lines into the geographic areas into which Cameron proposed to construct its line (A. 721-730).

In June, 1964, operating officials of Phillips and its pipeline company feared that they would lose control of the oil in the Como, Elmwood and Buffalo fields in Beaver County of the Oklahoma Panhandle (included in "Area 2" in the relevant markets established in plaintiffs' case) and the Logan Field, also in Beaver County (included in market "Area 3"). Their concern was that "this oil will be lost to another pipeline" if the Phillips pipeline company did not extend into those fields. Phillips' Operating Committee recommended reductions of 7 cents in its gathering and transportation charges for the extension.[5] In addition to reducing these charges (thereby increasing the net amount paid to producers for oil), the Phillips representatives proposed that purchases be on an "open division order basis" rather than the ten-year basis (or 11.4 million barrels) previously required, for the reason that "another purchaser" (namely, Cameron) was "offering to purchase on open division order basis."[6] Phillips considered it was in its

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[5]Plaintiffs' Exhibit 16a, June 16, 1964 (A. 1233-1234).

[6]Plaintiffs' Exhibit 16b, June 16, 1964 (A. 1241).

"best interest to control a large percentage of the crude oil reserves serving its refineries. . . . Unless Phillips is able to purchase this crude on the basis outlined above, other purchasers may lay a line to the area and obtain control of the oil."[7] These proposals were rejected by the Phillips' Executive Committee[8] and the Pipe Line Company's Board of directors, clearly because the terms were considered uneconomic.[9]

However, almost immediately thereafter, on July 14, 1964, less than a week after Cameron-Panotex obtained a bank commitment (July 8, 1964) for their pipeline, the Operating Committees of both Phillips and PPLC revived the rejected proposals in the identical form in which they had been previously made.[10] Three days later, Phillips' Executive Committee reversed itself and approved the proposal,[11] obviously because in the brief interim Cameron had secured its financing. The possibility that Cameron-Panotex would build a pipeline in Phillips' "back yard" (A. 359-360, 499) had now become an immediate threat; Phillips and its pipeline company were determined, regardless of cost and basic economics, to prevent this from happening.

Phillips intensified its efforts to prevent Cameron-Panotex from entering or securing more than an insignificant portion of the market. Top Phillips officials determined overnight to waive the requirements set forth in the pipeline company's economic studies (A. 501-502), which were based on the premise that an economic

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[7] *Ibid.* at A. 1242.

[8] Plaintiffs' Exhibit 16c, June 19, 1964 (A. 1246).

[9] Plaintiffs' Exhibit 16d, July 8, 1964 (A. 1250-1251).

[10] Plaintiffs' Exhibit 16a (A. 1235-1236), and Plaintiffs' Exhibit 16b (A. 1243-1244).

[11] Plaintiffs' Exhibit 16c (A. 1247).

pipeline could be built only if it secured a high percentage of the oil in the fields. The decision was made to proceed full steam ahead no matter how few producers committed themselves to Phillips. A proposed waiting period before commencement of the line was abandoned, and a crash program was put into effect to build and put the line in operation within 30 days.[12] As aptly stated by the trial court in denying Phillips' and Shamrock's original motions for a directed verdict:

> There is testimony in the record of the fact that the economic benefits be hanged, we're just going to get this thing built (A. 845)

To achieve its objective, Phillips entered into a remarkable written pact with Phillips Pipe Line Company. On July 31, 1964, Phillips agreed to pay "*any* gathering tariff over and above 17.5 cents per barrel which Phillips Pipe Line Company may establish for the area in question after January 1, 1968," provided that it would not return an annual average rate on investment of more than "approximately 7 % on an I.C.C. accounting basis."[13] PPLC in return waived its minimum requirements on barrels of committed oil. Thus, Phillips agreed that, if its pipeline company would waive its economic requirements and keep down its gathering charges to 17.5 cents per barrel until January 1, 1968 (apparently because the oil company wanted a little over three years to drive Cameron-Panotex out of the market), then Phillips would not object thereafter to *any* tariff subject to the limitation on investment return.

Thus, the independence formerly exhibited by these two corporations in pursuing their own business objec-

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[12] Plaintiffs' Exhibit 56f3 (A. 1276).

[13] Plaintiffs' Exhibit 17q (A. 1252-1253).

tives at "arm's length"[14] was abandoned when they became one in intent and actions to exclude Cameron-Panotex.

Phillips and PPLC completed their crude oil gathering system by September 3, 1964 (A. 267), four months prior to the completion of the Cameron-Panotex line (A. 187).

In July, 1964, Shamrock determined to extend its line north from the Frass and Follett fields in Lipscomb County, Texas. Before doing so, the president of Shamrock conferred with a high official of Phillips on two subjects critical to the construction of the Shamrock line, price and pipeline territory. In the first conversation, Shamrock determined that Phillips proposed to charge oil producers from whom they purchased oil 15 cents a barrel to amortize the cost of the pipeline (a decision which affected directly the amount paid on oil purchases) and in this and a follow-up call from Phillips, Shamrock informed Phillips that it planned to go into the Logan area and ascertained that Phillips was also interested in Logan. Shamrock stressed that "we think that we need that crude oil as a future supply of crude oil for our refinery" (A. 428-429). After these conversations, Phillips stopped its pipeline short of Logan in Beaver County, Oklahoma, honoring Shamrock's professed need for the oil in that field. While Phillips extended offers to producers in Logan, these offers were considerably less attractive than Shamrock's and obviously would be unacceptable to the producers. Similarly, Shamrock, after learning in these conversations that Phillips was in fact planning to extend its line into Como, abandoned

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[14] Harry G. Fair, the P.P.L.C. president, testified that "we operate Phillips Pipe Line Company strictly at arm's length" and that "it [the pipeline company] is an entity unto itself" (A. 348-349).

whatever thoughts it may have had of entering that field, even though it would have been a much more substantial source of oil than the Logan field and Shamrock had previously expressed interest in going into Como. In August, 1964, Shamrock extended its line into the Bechtold and Logan fields (A. 443). (See Plaintiffs' Exhibit 118 reproduced in the Appendix to this Petition at p. 31a; the original of this exhibit has been forwarded to the Clerk of this Court.)

From July through November, 1964, Shamrock progressively increased the net-back price it was offering to producers in the Logan and Bechtold fields (A. 454-463) in an effort to deprive the Panotex pipeline of vitally needed oil.

Shamrock did not limit itself to its pricing weapon to restrain Cameron-Panotex. The testimony also reflects that Shamrock and Shamrock Pipe Line Corporation continued until September, 1968 (the cut-off date imposed by the trial court on evidence of acts by the defendants) to extend their pipeline and to set their prices in a manner calculated to prevent the growth of Cameron-Panotex—the Shamrock Oil Company setting the prices and the pipeline company installing the lines (*e.g.*, A. 434-435). Shamrock, like Phillips, abandoned net prices established on the basis of its analysis of the economic requirements to support the pipeline.

The evidence of Cameron-Panotex further was that, during the period from February, 1964, to June, 1964, when plaintiffs were seeking to obtain financing for their pipeline from the First City National Bank of Houston, the Houston bank, unknown to Cameron-Panotex, had been in communication with Phillips (A. 294). The trial court (improperly, petitioners assert) denied admission of evidence proffered by Cameron-Panotex consisting of correspondence running between its financial consultant [Kaye] and an official of the Houston bank [Gueymard]

and of memoranda prepared by Kaye contemporaneously with the negotiations reflecting that "Phillips positively does *not* want this line put in, that they are very mad about it–that they want the oil there";[15] that "Phillips decidedly does not want this pipeline which it considers is in its 'backyard'."[16] These actions, as well as other delays encountered by Cameron-Panotex as a result of defendants' activities, caused great financial loss to Cameron-Panotex as did the combined steps of Phillips and Shamrock to box in the independent pipeline and to impede its normal growth pattern.

REASONS FOR GRANTING THE WRIT

I

The Proper Federal Standard For Passing On A Motion For Directed Verdict Under Rule 50(a) Of The Federal Rules Of Civil Procedure, Particularly In Antitrust Cases, Should Be Settled By This Court.

The trial court denied Phillips' and Shamrock's motions for directed verdicts against Cameron-Panotex at the close of plaintiffs' case.[17] Thereafter, however, the court interrupted the presentation of evidence by the defendants at a completely random point and invited the renewal of those motions, and then granted directed verdicts in favor of Phillips and Shamrock.

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[15] Plaintiffs' Exhibit 56g19 (A. 1316).

[16] Plaintiffs' Exhibit 56g20 (A. 1317-18).

[17] The trial judge, after lengthy argument, stated his reasons for denying the motions for directed verdict: "If it were clear-cut where reasonable men could not differ, I wouldn't hesitate a minute to instruct a verdict. *I just think this one has some fact issues that must be submitted to the jury because I know reasonable jurors could differ*...." (A. 881) (Emphasis added.)

The evidence introduced by the defendants related primarily to attempting to justify their actions which, it was contended, were based upon the necessity for their respective refineries to acquire crude oil in the area in which plaintiffs were constructing an independent pipeline. Further, each defendant introduced evidence as to the nature and extent of purported past competition between the two defendants. This evidence, then, formed the basis for the court's granting a directed verdict which it had denied earlier in the previous state of the record. [18]

The court of appeals fully upheld such actions, although it paid token observance (Opn., App., p. 6a) to the principles of "orderly procedure in the frame of reference of trial court discretion, procedural due process, and a fair trial"[19]. While conceding that the granting of a directed verdict at a random point in the trial was unique, stating that "we have found no case in point one way or the other" (Opn., App., p. 6a), the court refused to pass on whether Rule 50(a) F.R. Civ. P., or any other principle prohibited such action, seeking to avoid the issue by analogizing the matter to the harmless error rule which exists under federal criminal procedure in the reservation of ruling on a defendant's

[18]The action of the trial judge was not a rethinking of his previous denials of directed verdicts based on the evidence as at the close of plaintiffs' case; instead, he specifically stated that his ruling encompassed the evidence presented by defendants. The trial judge announced to the jury that his rulings as to both defendants for a directed verdict were based on "the state of the evidence to this point in the trial" (A. 1197). The final order of the trial court stated that the court had based its directed verdicts on the "state of the record at the time the motions were granted", (Instr. No. 121, A. 87).

[19]This quotation from the court of appeals aptly summarizes petitioners' argument on this score, although of course petitioner believes the court below to be wrong in its resolution of the issue.

motion to acquit where the evidence is sufficient to sustain a conviction at the close of the Government's case (Opn., App., p. 7a). In order to do this, however, and in explicit contradiction of its analogy, the court of appeals resolved the case on the basis of evidence introduced by defendants, Phillips and Shamrock, and by drawing inferences from such evidence unfavorable to the non-moving parties, Cameron-Panotex.[20] In addi-

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[20] Thus, for example, the court accepted Phillips' and Shamrock's evidence presented through their expert witnesses (*e.g.*, A. 922-933, 937-940, 983, 1095-1097) that both companies needed the oil for their respective refineries and that the actions of the parent companies in concert with the subsidiary pipelines amounted to nothing more than a proper business motive under the circumstances, which arose out of a desire to protect their positions (Opn., App., pp. 19a, 20a, 21a). The Phillips-Shamrock telephone calls relating to pipeline routings and to pricing policies were determined to be completely innocent on the basis that the companies had been "competitors" in the past and the court determined that lack of ability to obtain commitments was the basis for Phillips' yielding the Logan area to Shamrock and for Shamrock avoiding the Como area (Opn., App., pp. 21a-22a) all based on the court's acceptance of defendants' evidence (*e.g.*, A. 1096-1104).

The court ignored plaintiffs' evidence and inferences flowing therefrom as, for example: Phillips and Phillips Pipe Line agreed to rush through to completion an uneconomic pipeline extension to block the Cameron-Panotex pipeline (A. 501-502; Plaintiffs' Exhibit 17q, A. 1252-1253). Both Phillips and Shamrock raised their offers to producers to deprive the Panotex pipeline of oil (A. 1239, 1242, 1244, 1216-1229, 1474-1475; A. 1233-1234, A. 457-463). Shamrock continued to extend its pipeline to block plaintiffs' line (*e.g.*, A. 434, 557, 561, 563, 566). Phillips and Shamrock, as noted *supra*, conferred on the subject of prices and the route in which each would extend its pipeline in the area of plaintiffs' proposed line (A. 428-429). Plaintiffs offered to sell or otherwise make available oil to both defendants (A. 147-149, 152-157). Plaintiffs offered to connect their pipeline to Sham-

tion, the court ignored much of the evidence favorable to plaintiffs and the inferences flowing therefrom. Such evidence as the court did consider was reviewed by "tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each" rather than by looking " 'at the whole picture' " and " 'not merely at the individual figures in it.' " *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

The action of the trial judge, upheld by the court of appeals, thus not only raises the issue of the propriety of directing a verdict at such a point but also necessarily involves the application of the Fifth Circuit's standard for testing the sufficiency of the evidence on a motion for directed verdict, that standard, as set forth in *Boeing*

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rock's which in turn connected to Phillips' pipeline (A. 470). Five thousand barrels of oil per day were available in Como 6 to 8 miles from the Shamrock pipeline, yet after conferring with Phillips, Shamrock built the same distance to Logan where about 1600 barrels per day were available and 6 miles to Bechtold where only 500 to 600 barrels per day were available (A. 552-554, 1352, 1090). The financial prerequisites for a proposed pipeline operating on an independent basis demonstrated that there was room economically for only one line (A. 681, 685-687, 724-725, 729). The court ruled that Exhibit 152 was improperly excluded (Opn., App., p. 8a) but never considered it in respect to the document's description of how a major integrated oil company could and would use its pipeline as a "fighting ship." This exhibit also formed the basis for Shamrock's awareness of the necessity to avoid unapproved invasions of Phillips' "backyard" (A. 1324-1327). Phillips admitted that it had "built many pipe lines that were not economically feasible" (Rec. 544) and when Phillips sold crude that "nine times out of ten it would enable Phillips to put the equivalent desirable crude into our own refinery. . ." (A. 338). Both defendants sold large quantities of oil to each other and were joint owners of a products pipeline serving their refineries (Pls. Ex. 20c1-20c22, A. 571-573; A. 390).

Company v. Shipman, 411 F.2d 365, 374 (1969) (*en banc*), and applied below (Opn., App., p. 10a), being that:

> [T]he Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion.[21]

The present case affords this Court the unique opportunity to clarify an area of the law that has been the subject of widespread controversy, confusion and discussion and involves a problem that arises daily in federal jury trials throughout the nation. It is an area which courts and commentators have called to this Court to settle. The need for clarification is particularly great in antitrust cases which are often, as here, complex in nature, and where "summary procedures should be used sparingly" and "where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962), a case decided by summary judgment. See also, *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969), where in dealing with an alleged antitrust conspiracy this Court

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[21] Judges Thornberry and Goldberg, concurring specially, interpreted the majority's "standard" to mean that "the court should consider the *evidence* and *inferences most favorable to the opposing party and the uncontradicted evidence put on by the movant*" and that "the court should grant the motion only if reasonable, fair-minded men could *reach no conclusion other than the one urged by the movant*." 411 F.2d at 405. (Emphasis added.) Judge Rives dissented, stating that "the standard" was in conflict with the teachings of this Court in Lavender v. Kurn, 327 U.S. 645, 653 (1946); 411 F.2d at 392.

spoke of the need for resolution of material issues of fact "by the jury after a plenary trial."

These unresolved questions relating to Rule 50(a) F.R. Civ. P. have been succinctly summarized by Professor Wright in the *Law of Federal Courts* (2d ed. 1970), pp. 425-426, as follows: (1) whether the court is to look only to the evidence favorable to the party against whom the motion is made or whether it is to consider all the evidence; (2) whether the pronouncements by this court in jury actions arising under the Federal Employers' Liability Act and the Jones Act represent a uniform standard which is controlling in all jury cases in the federal courts; (3) the proper technique in resolving all "legitimate inferences" that may be drawn from the evidence in the non-movant's favor.

Professor Wright states (p. 426) that this Court has "apparently" adopted the rule that only evidence favorable to the non-moving party may be considered, citing *Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949) ("we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given") and *Berry v. United States*, 312 U.S. 450, 456 (1941) ("There was evidence from which a jury could reach the conclusion that petitioner was totally and permanently disabled. That was enough."), and citing at pp. 426-27 the many decisions of this Court to the same effect in Federal Employers' Liability Act and Jones Act cases. Professor Wright then says (p. 426):

> Despite these decisions from the Supreme Court, many lower courts continue to follow the older practice.

And he cites for this proposition decisions from various courts of appeals, including the Fifth Circuit's

decision in *Boeing Co. v. Shipman, supra.*[22] Cases to the contrary from other courts of appeals are cited.[23] Thus, we have not only an apparent refusal to follow the guiding principles laid down by this Court but also a direct conflict in the circuits on this issue.

This matter has been in controversy for years, amid many calls upon this Court to clarify the question. Professor Wright says, referring to the FELA and Jones Act cases (p. 426):

> It is of much practical importance to know whether these decisions are confined to the particular statutory actions in which they have been handed down, or whether they represent a construction of the Seventh Amendment that is controlling in all jury cases in federal courts.

Professor Wright's statement exemplifies the continuing plea which has been made over the years to this Court to provide guidance to the lower federal courts regarding this question of most fundamental importance.[24]

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[22] Other cases cited are as follows: *Steif v. J.A. Sexauer Mf'g. Co.*, 380 F.2d 453 (2d Cir.) *cert. denied*, 389 U.S. 897 (1967); *Smith v. United States*, 337 F.2d 237 (9th Cir. 1964); *Dehydrating Process Co. v. A.O. Smith Corp.*, 292 F.2d 653 (1st Cir.), *cert. denied* 368 U.S. 931 (1961). These are but illustrative of the many cases within the circuits as is also true of the cases cited in the next footnote.

[23] These cases are as follows: *Lohr v. Tittle*, 275 F.2d 662 (10th Cir. 1960); *Weir v. Chicago Plastering Institute*, 272 F.2d 883 (7th Cir. 1959); *Simpson v. Skelly Oil Co.*, 371 F.2d 563 (8th Cir. 1967), cf. earlier decision of the same circuit, *Hanson v. Ford Motor Co.*, 278 F.2d 586 (8th Cir. 1960).

[24] 2B, Barron & Holtzoff, *Federal Practice & Procedure*, § 1075; 9, Wright & Miller, *Federal Practice and Procedure*: Civil

To summarize, the unique issue whether a trial court may direct a verdict at a random point during defendants' case after a motion for directed verdict at the end of plaintiffs' case has been denied, is here inextricably intertwined with the constantly recurring issue of the proper federal standard for testing the sufficiency of the evidence. Both issues arise under Rule 50(a) F.R. Civ. P., and both should be resolved by this Court.

II

The Conflict In The Circuits Concerning The Need To Prove "Dangerous Probability" In Attempt To Monopolize Cases Should Be Resolved.

This petition presents the important question, never directly determined by this Court, of whether in establishing the antitrust offense of attempt to monopolize in a private treble damage action the plaintiff must prove that there was a dangerous probability that the attempt would be successful. Here, the opportunity is afforded

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§ 2526; *Multiple Sufficiency Tests in Federal Courts: The Scope of Lavender*, 1970, Utah L.Rev., p. 155, specifically criticizing *Boeing v. Shipman* as failing to follow the standard set forth by this Court in *Lavender v. Kurn*, observing further that commentators have pointed to a series of per curiam reversals of circuit court decisions overturning jury verdicts for plaintiffs in non-FELA cases, citing Jaffe, *Judicial Review: Questions of Fact*, 69 Harv. L. Rev. 1020, 1043 & n. 85 (1956); Bagalay, *Directed Verdicts and Right to Trial by Jury in Federal Courts*, 42 Tex. L.Rev. 1053, 1064-1071 (1969); McBaine, *Trial Practice: Directed Verdicts: Federal Rule*, 31 California L.Rev. 454, 462-463 (1948). For a detailed review of this entire area, see Cooper, *Directions for Directed Verdicts: Compass for Federal Courts*, 55 Minn. L.Rev. 903 (1971).

for settlement of this issue in a case not decided at the pleading stage but one in which the merits were reached.

A primary basis upon which Cameron-Panotex filed their complaint and tried their case was that Phillips and Shamrock each violated Section 2 of the Sherman Act in attempting to monopolize the purchase and transportation of crude oil in the area in which it extended its pipeline in an effort to eliminate Panotex as a pipeline competitor. The court of appeals disposed of this charge by stating, in the case of Phillips, that "a dangerous probability of success is clearly lacking" (Opn., App., pp. 18a-19a) and, in the case of Shamrock, that "[t]he proof is clear that there was no dangerous probability of a monopoly" (Opn., App., p. 21a).

There is a direct conflict in the United States courts of appeals respecting the need to establish dangerous probability of success in attempt to monopolize cases.[25]

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[25]*Lessig v. Tidewater Oil Company*, 327 F.2d 459, 474 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), held that probability of actual monopolization is not an essential element of proof of attempt to monopolize; *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961) held that in a conspiracy to monopolize case there need not be proof of a dangerous probability that monopolization will result from such conspiracy. To the contrary are *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 974 (8th Cir. 1968), *cert. denied* 395 U.S. 961 (1969); *Mackey v. Sears, Roebuck & Co.*, 237 F.2d 869, 873 (7th Cir. 1956); *Bernard Food Industries, Inc. v. Dietene Co.*, 415 F.2d 1279, 1284 (7th Cir. 1969), *cert. denied*, 397 U.S. 912 (1970); and *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 207 (5th Cir. 1969). See also *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332, 339 (4th Cir. 1959), finding a deficiency in failure to plead, *inter alia*, a "dangerous possibility" that a monopoly could be effectuated. Subsequent to the *Cliff Food* decision in the Fifth Circuit, that court, in *Woods Exploration & Producing Co., et al. v. Aluminum Company of America, et al.*, 438 F.2d 1286, 1304

It is the position of Cameron-Panotex that in the instant case the court below, in holding that proof of a dangerous probability of success was requisite to a verdict in plaintiffs' favor, applied an incorrect standard. The offense of attempt to monopolize under Section 2 is a separate offense from that of monopolization and should be defined in the light of Congress' purpose in the Sherman Act to reach all unreasonable restraints of trade (*Standard Oil Co. v. United States*, 221 U.S. 1, 61 (1911)):

> [T]he second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not

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(1971), *cert. denied*, ___ U.S. ___ (1972), noted that "cases have seemingly split as to whether a dangerous probability of monopolization is an essential element of proof" and did not "resolve this conflict over the requisites of conspiracies or attempts." Although *Woods* was decided in the Fifth Circuit subsequent to *Cliff Food*, that court of appeals made no reference to *Woods* in the instant case in accepting the Cliff Food ruling that proof of "dangerous probability" was essential. Discussions of the ingredients of the offense of attempt to monopolize in legal periodicals include Turner, *Antitrust Policy and the Cellophane Case*, 70 Harv. L. Rev. 281 (1956); Blecher, *Attempt to Monopolize Under Section 2 of the Sherman Act: "Dangerous Probability" of Monopolization Within the "Relevant Market,"* 38 Geo. Wash. L.Rev. 215 (1969); Johnston, *Monopolize or Attempt to Monopolize*, 3 A.B.A. Section of Antitrust Law 72 (1953); Hibner, *Attempts to Monopolize: A Concept in Search of Analysis*, 34 A.B.A. Antitrust Law Journal 165 (1967); Scott and Rockefeller, *Antitrust and Trade Regulation Today: 1967*, at pp. 1-3. See also, *Memorandum for the United States* as *amicus curiae* in *Hiland Dairy, Inc. v. Kroger Co.* in this Court (Oct. Term, 1968, No. 986), at pp. 10-12.

> embraced within the general enumeration of the first section.

In keeping with this announced purpose of this Court that Section 2 seeks to "embrac[e] all attempts to reach the end prohibited by the first section [Section 1 of the Sherman Act]," the court of appeals in *Lessig v. Tidewater Oil Company, supra*, 327 F.2d at 474, said, in response to defendant's argument that plaintiff must prove "dangerous probability of success, i.e., that if unchecked monopolization will result":

> We reject the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize. Of course, such a probability may be relevant circumstantial evidence of intent, but the specific intent itself is the only evidence of dangerous probability the statute requires--perhaps on the not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective.

For that reason, "[w]hen the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is 'not in issue'." *Lessig v. Tidewater Oil Company, supra* at 474.

The evidence makes it abundantly clear that the intent of each of the defendants was to exclude Cameron-Panotex from and to monopolize an appreciable segment of interstate purchase and transportation of crude oil, *e.g.*, the decision by Phillips and Phillips Pipe Line Company, when faced with the imminent construction of the Panotex line, to proceed with their pipeline extension on a basis–as the trial judge put it–"that the economic benefits be hanged, we're just going to get this thing built" (A. 845); the actions by both Phillips and Shamrock to pay increased amounts to producers to

prevent Cameron-Panotex from securing oil for its pipeline (A. 1239, 1242, 1244; 457, 463); the progressive extensions of its pipeline by Shamrock to hem in the Panotex line (557-566).

The conflict in the decisions of the circuit courts of appeals is one which should be resolved not only for this petitioner but for other private treble damage plaintiffs whose efforts to enter and to remain in business have been imperiled by similar conduct. Otherwise, "the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States" will be threatened. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 136 (1968).

III

An Agreement Between An Integrated Oil Company And Its Pipeline Subsidiary To Build A Pipeline On An Uneconomic Basis For The Purpose And With The Probable Effect Of Monopolizing The Relevant Market Cannot Be Justified By The Oil Company's Alleged Need For Oil.

A. Importance of Court's Ruling.

The court of appeals' ruling with respect to the manner in which an integrated oil company may use its separately-incorporated pipeline presents substantial questions under the antitrust laws not heretofore considered by this Court. In this case, the two oil companies, Phillips and Shamrock, when faced with the threat of competition by plaintiffs, each used its wholly-owned pipeline subsidiary as a tool to accomplish the purpose of the parent, with no regard for the independent existence or economic requirements of the separate pipeline corporation.

The importance of oil pipelines to the petroleum industry cannot be overestimated. In response to an inquiry at a Congressional hearing as to whether "it is not too much to claim–in fact, it has been the experience of the oil industry–that the control over transportation is the most effective method for controlling the oil industry in the United States," the then Assistant Attorney General in charge of the Antitrust Division replied, "Certainly one of the most effective."[26] Oil pipelines may be used to compel independent producers without means of transportation to sell their crude at the well to the oil company whose subsidiary operates the pipeline and may be used to deprive independent refinery operators of a source of crude. To accomplish these and other anticompetitive purposes, major oil companies, as here, use their pipeline subsidiaries as "fighting ships" to eliminate competition.[27]

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[26]Report of the Antitrust Subcommittee, Committee on the Judiciary, pursuant to H.R. 27, 86th Cong., 1st Sess., "Consent Decree Program-Department of Justice," p. 62 (1959).

[27]The manner in which a pipeline subsidiary can be used as a competitive tool was indicated by Plaintiffs' Exhibit 152 (wrongfully excluded from evidence by the trial court and held to be admissible by the court of appeals [Opn., App., p. 8a]) where an official of Phillips noted that "if the decision is made that we should raid Shamrock, this can only be accomplished by full cooperation on the part of the Pipe Line Company in that they will have to make pipe line connections to the leases immediately as they are raided" (A. 1325).

B. Agreement Between Phillips and Its Pipeline To Monopolize and Restrain Trade in the Relevant Market.[28]

There is substantial evidence in the record from which the jury reasonably could have found (1) that Phillips and PPLC acted for the purpose of achieving a monopoly in Area 2;[29] (2) that the pipeline was to be built on an uneconomic basis; and (3) that there was a dangerous probability that PPLC would achieve a monopoly in this market.

1. *Purpose to achieve monopoly and restrain trade*

In determining whether or not to enter Area 2, Phillips was guided by an overriding consideration, repeatedly expressed by its Operating Committee:

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[28]The conduct of Shamrock and its wholly-owned subsidiary pipeline equally reflects the purpose of an integrated oil company to use its pipeline as an instrument to accomplish the objectives of the parent company without regard to the economic requirements of the pipeline subsidiary. See, for example, A. 1045-1047 re: Shamrock's views as to the economic requirements of its Logan extension. This extension was made in the face of the impending construction of the Panotex line, but the economic requirements were never fulfilled (A. 1352). See also *e.g.* A. 454-460: 352, Shamrock extensions to box in Panotex. Shamrock conceded in its brief in the court of appeals that "[p]ositive evidence shows that all decisions regarding the operation of the pipeline company were management decisions of Shamrock (Tr. 780-781, Ap. 420-22)" and that "[t]he only inference to be drawn from the evidence which plaintiffs introduced (Tr. 814-15, 828-29, Ap. 451-52, 465-66) is that Shamrock managed and operated Shamrock Pipe Line." Shamrock's brief, p. 28.

[29]Assumed by the court below to be a relevant submarket (Opn., App., p. 15a).

> Over the long term it will be to Phillips' best interest to control a large percentage of the crude oil supplies serving its refineries. Crude from this area will be a valuable supply for the Borger Refinery. Unless Phillips is able to purchase crude oil from this area on the basis outlined, other purchasers may obtain control of the oil. (A. 1239; see also 1242, 1244.)

Under the proposal which was considered in entering this market, letters of intent were to be "obtained from producers representing a minimum of 5,400 B/D, which is approximately 68% of the 8,000 B/D of production in the area . . ." (A. 1242, 1244, 1247). It is clear that these were minimum goals and that Phillips and its pipeline company hoped to secure the entire production in this area. That Phillips would achieve this result if it were able to enter the market before any other competitor was indicated by the fact, as the court below found, "that a pipeline tends to be a natural monopoly" and furthermore "that the first pipeline into an area customarily gets the connections that are available in the oil fields" (Opn., App., p. 11a).[30]

Because the first oil company to enter a market "customarily" achieves a monopoly, time is necessarily of

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[30] Where a company entering a natural monopoly market engages in "an unfair practice, not honestly industrial" such conduct is "conclusive evidence of the exclusionary intent proving a violation of Section 2." *Union Leader Corp. v. Newspapers of New England*, 284 F.2d 582, 585 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961). See also *United States v. Aluminum Co. of America*, 148 F.2d 416, 429-431 (2d Cir. 1945) and *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 341 (D. Mass. 1953), aff'd 347 U.S. 521 (1954). The agreement between Phillips and its pipeline subsidiary to extend its pipeline on an uneconomic basis (discussed below) was clearly an "unfair practice, not honestly industrial" and thus is "conclusive evidence of the exclusionary intent proving a violation of Section 2" (*Union Leader, supra*, at p. 585).

the essense. As a top official of Phillips testified, the line was sought to be completed "as quickly as possible" (A. 500). A crash program was put into effect immediately after plaintiffs obtained their financing so that the Phillips' pipeline would be in operation within 30 days, in contrast to a waiting period of 60-180 days previously contemplated. The obvious purpose of this acceleration was to get a jump on the plaintiffs, who did not enter until 4 months later, and thus to secure a monopoly and to prevent plaintiffs from entering this market.

2. *The uneconomic basis of the proposed pipeline.*

Phillips Pipe Line Company had conducted study after study in which it had concluded that certain minimum requirements were necessary for the operation of an economic pipeline in Area 2. It had determined that a minimum of 5,400 barrels a day would have to be secured to make the line profitable on a self-sustaining basis.

To achieve its competitive purpose to exclude plaintiffs from the market, Phillips entered into an agreement with PPLC under which the latter agreed to waive the economic requirements which it had established and, as the court below found, "Phillips agreed with its pipeline subsidiary to guarantee it a seven per cent return on investment as a condition of a pipeline extension into Area II" (Opn., App., p. 17a). Thus, in effect, Phillips agreed to subsidize the line as a substitute for the economic requisites which the pipeline company had established.

The court rejected the evidence with respect to the lack of economic feasibility of the pipeline on the ground that there was "no proof, however, that the extension

was unprofitable and thus something from which an inference of predatory conduct could be drawn" (Opn., App., p. 18a). (Emphasis added.) Whether the pipeline in fact turned out to be profitable or unprofitable, however, was not of importance, just as it was not necessary for the parties actually to have achieved their purpose of securing a monopoly. The critical fact in determining whether there was an attempt to monopolize or an unlawful agreement in restraint of trade was the parties' purpose at the time in taking the action which they did.[31] Furthermore, it seems clear that the jury could reasonably have inferred that the pipeline was not economic from the fact that the pipeline company had determined that certain minimum requirements were necessary for an economic line and that these requirements were not met.

3. *Dangerous probability of securing a monopoly.*

Although, as we have demonstrated, the showing of a dangerous probability of achieving a monopoly is not necessary to establish an attempt to monopolize under Section 2 of the Sherman Act, nevertheless, there can be little doubt but that when Phillips' pipeline subsidiary entered the relevant market it was highly probable that a monopoly would be secured, despite the lower court's conclusion that "a dangerous probability of success is clearly lacking" (Opn., App., pp. 18a-19a). Since "a pipeline tends to be a natural monopoly" and "the first pipeline into an area customarily gets the connections that are available in the oil fields" (Opn. App., p. 11a), it

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[31]As noted earlier, the trial judge pointed out when he originally denied Phillips' motion for a directed verdict: "There is testimony in the record of the fact that the economic benefits be hanged, we're just going to get this thing built."

follows inexorably that there is a high probability that the first pipeline to enter a field will achieve a monopoly. This is particularly true when the pipeline in question is a wholly-owned subsidiary of a large integrated oil company, and the competitive pipeline is newly formed and of comparatively minuscule proportions. There is good reason to believe that, had plaintiffs not instituted this lawsuit immediately after the decision by Phillips to enter the market, this purpose would indeed have been achieved.

C. Phillips' Alleged Need for the Oil in the Field Was Not a Proper Justification for Its Unlawful Conduct.

The court below concluded that Phillips acted in accordance with a "proper business motive" (Opn., App., 18a) in causing its subsidiary to extend its pipeline into Area 2. The stated justification which the court found to be proper was the claim by Phillips that it "needed the oil for its refinery" (Opn., App., p. 18a). It seems clear that a small pipeline company such as Panotex can survive competition with an integrated company only if the major oil company maintains its pipeline subsidiary on an independently economic basis. Thus, the justification of any action by a pipeline subsidiary must be related to the economic needs of the subsidiary itself and not to those of the parent company. The fact that the parent company may "need" the oil could cause it to operate the subsidiary on an uneconomic basis which could put the independent out of business or inflict serious financial injury upon it.

The decision by Phillips to cause its pipeline subsidiary to extend its pipeline solely to achieve the purposes of the parent company despite the fact that its pipeline was not self-sustainable, exemplifies the type of abuse which

can result from the control of pipelines by integrated oil companies. A pipeline which is operated to serve the objectives of the integrated oil company which owns it and which is afforded subsidies by its parent company to accomplish those objectives may tend to sacrifice the interests of other producers and refiners and in its operations may, as occurred here, compete in a predatory manner against independent companies. To avoid these potential abuses, a petroleum company must maintain the independence of the pipeline company and permit it to operate in a manner consistent with the latter's independent economic interests.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1335

PANOTEX PIPE LINE COMPANY, ET AL,
Plaintiffs-Appellants,

versus

PHILLIPS PETROLEUM COMPANY and
DIAMOND SHAMROCK CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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(February 17, 1972)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

BELL, Circuit Judge: This appeal arises out of antitrust litigation. The district court directed verdicts for the defendants. We affirm.

Cameron and its pipeline subsidiary, Panotex, claimed damages jointly and severally against Phillips

and Shamrock, alleging a conspiracy between them, and also a conspiracy between each of them and their respective subsidiaries, Phillips Pipe Line Company and Shamrock Pipe Line Corporation. The gist of the complaint was a conspiracy, as stated, to restrain and monopolize, and to attempt to monopolize interstate commerce in the purchase and transportation of crude oil in designated areas in violation of §§ 1 and 2 of the Sherman Act. 15 USCA, §§ 1 and 2. The cause of action also alleged individual conduct on the part of Phillips and Shamrock in violation of the same statutes. The prayer was for damages and injunctive relief under §§ 4 and 16 of the Clayton Act. 15 USCA, §§ 15 and 26. The complaint and the evidence introduced in support thereof bottoms out as a claim that defendants attempted to foreclose a competitor, and having failed in that, to thereafter restrict the competitor.

The cause was tried to a jury. Motions for directed verdicts filed by Phillips and Shamrock were denied by the district court at the close of plaintiffs' case. Defendant Phillips then proceeded to put on its defense. Shamrock put in a part of its evidence through cross-examination of witnesses for Phillips. After two days of defense evidence, the court suggested, sua sponte, that Shamrock again move for a directed verdict. Shamrock so moved and the motion was granted. Phillips then asked for the same relief and its motion was granted. Counterclaims against Cameron and Panotex were severed and are not a part of this appeal.

There are three assignments of error. First, plaintiffs urge that it was prejudicial procedural error to

grant motions for directed verdicts in the middle of defendants' cases, i.e., at a random time during the trial. The contention is that a directed verdict may be granted under Rule 50, F.R.Civ.P., only after the opening statement of opposing counsel, at the close of the evidence offered by an opponent, or at the close of all of the evidence, citing 5A Moore's Federal Practice, par. 50.04. Plaintiffs also assign error on a substantive basis in the granting of directed verdicts, urging that the evidence was sufficient to make a jury question. Lastly, error is asserted on the basis of the exclusion of certain items of evidence offered by plaintiffs.

The facts will be detailed in connection with the discussion of the alleged substantive error in directing verdicts for defendants. We proceed first to a discussion of the claimed procedural error.

I.

The motions for directed verdict were granted during the presentation of the defense testimony. There was extensive colloquy between the court and counsel. The posture of the case at the time was somewhat complex in that the counterclaims of each defendant based on alleged antitrust violations by plaintiffs were being tried to the same jury. Plaintiffs' proof was voluminous and the court indicated that it had reviewed all of the testimony to date and was inclined to reconsider the motion of Shamrock for a directed verdict, and also to sever Shamrock's counterclaim. (This was the previously overruled motion for directed verdict.)

The court then ruled as indicated for Shamrock. At that point, plaintiffs joined with Phillips in moving f a mistrial because of the hiatus and confusion left in the proof as to liability and damages due to the removal of Shamrock. Phillips had moved for a directed verdict following the grant of Shamrock's motion but this motion was overruled. Following the joint motion for mistrial, the court reconsidered and granted Phillips' motion for directed verdict and also severed its counterclaim.

At no time during the proceeding did plaintiffs fer any objection whatever to the timing of the directed verdicts. Moreover, nothing was said during the proceeding which pointed to any prejudice to plaintiffs from the standpoint of timing.

There was a hearing on the form of the final judgment about a month later. At this hearing, plaintiffs took the position for the first time that they were prejudiced by the timing of the grant of the motions in that they had previously reserved the right to redirect examination of certain witnesses. The record does not reflect this reservation. The court, in fact, required plaintiffs to complete their case prior to closing.

At the same hearing, plaintiffs urged the court to make it clear in the final judgment that the motions for directed verdicts were granted on the state of the record at the time the motions were granted. The court and all counsel agreed that this was the case and the judgment so provides. Having this in mind, plaintiffs take a different position here with respect to prejudice.

They no longer urge the reservation of the right to redirect examination of the witnesses. They now contend that the court granted them the right to rebut evidence put in by Phillips in two instances. This evidence, produced from the files of Shell Oil Company, consisted of commitments to Cameron from oil producers to sell crude oil for transportation by Panotex. The pipeline of Panotex connected with that of Shell and all Cameron sales were to Shell. The other evidence was the record of oil deliveries from Cameron to Shell via Panotex. We are unable to perceive the need to rebut this evidence. We are not told how it could be rebutted, nor how it was in anyway prejudicial. We find no prejudice to plaintiffs in these events.

We do not reach the question whether Rule 50, F.R. Civ. P.,[1] prohibits the granting of a motion for directed

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[1]Rule 50:

"(a) Motion for Directed Verdict: When Made: Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

"(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. . . ."

verdict during the presentation of a defendant's case. The rule contains no such restriction nor have we found any authority supporting such a restriction. Indeed, we have found no case in point one way or the other. The Supreme Court long ago pointed to the salutary purpose of a motion for directed verdict. In *Merchants' National Bank of Boston v. The State National Bank of Boston*, 1871, 77 U.S. 604, 19 L.Ed. 1008, it was said with reference thereto:

> "According to the settled practice in the courts of the United States, it was proper to give the instruction if it were clear the plaintiff could not recover. It would have been idle to proceed further when such must be the inevitable result. The practice is a wise one. It saves time and costs; it gives the certainty of applied science to the results of judicial investigation; it draws clearly the line which separates the provinces of the judge and the jury, and fixes where it belongs the responsibility which should be assumed by the court." 77 U.S. at 637

In the end, the question of directing a verdict for a defendant during the defendant's presentation is one of orderly procedure in the frame of reference of trial court discretion, procedural due process, and a fair trial. Here there is nothing of record to support any denigration of procedural due process or the essence of a fair trial. Thus we find no error as claimed.

From the view that plaintiffs must show prejudice, the situation is analogous to federal criminal procedure where the court commits error by reserving a ruling on a defendant's motion to acquit. The error is harmless absent a showing that the evidence was insufficient to sustain a conviction when the government rested its case. *Cooper v. United States,* 5 Cir., 1963, 321 F.2d 274, 277; *Montoya v. United States,* 5 Cir., 1968, 402 F.2d 847, 849-50; *United States v. Day,* 5 Cir., 1971, 438 F.2d 121, 122.

As Justice Field stated for the court in *Oscanyan v. Winchester Repeating Arms Company,* 1881, 103 U.S. 261, 26 L.Ed. 539, in a case where a verdict was directed following the opening statement of counsel:

> "... if in the progress of a trial, either by such admission [of counsel] or proof, a fact is developed which must necessarily put an end to the action, the court may, upon its own motion or that of counsel, act upon it and close the case." 103 U.S. at 263

II.

Before considering the merits of the action of the district court in granting the motions for directed verdict, it will be necessary to resolve the question presented with respect to the exclusion of certain evidence offered by plaintiffs. This question involves three separate items.

The first item is an inter-corporate letter from one Phillips employee to another, dated November 11, 1960, setting out the general situation in the industry as to oil reserves in the general geographical area pertinent to this suit. The letter mentions the prospect of raiding Shamrock's customers to increase Phillips' crude oil supply. The crude oil reserves and acquisition prospects of many oil companies in the area are also discussed. The position of plaintiffs is that this letter was admissible to show motive for later concerted action between Phillips and Shamrock. The district court excluded it on the ground that it originated prior to the period of activities giving rise to the suit.

We hold that this letter was admissible, and was to be given such weight as it might deserve in light of the proof, if any, as to any future concerted action between Phillips and Shamrock. Cf. *Federal Trade Commission v. Cement Institute*, 1948, 333 U.S. 683, 705, 68 S.Ct. 793, 92 L.Ed. 1010. Accordingly, it will be considered here in determining whether verdicts should have been directed.

The next item was a contract showing that Shamrock purchased casinghead gas from oil producers. Plaintiffs, not having a refinery, purchased only crude oil and condensate. The argument is that Shamrock used casinghead gas purchases as a lever to obtain contracts for the purchase of crude oil and condensate; hence, an illegal tying arrangement. The district court excluded this evidence on the ground that it was irrelevant to the pleadings.

Ordinarily this evidence would have been admissible to show the vehicle for an illegal tying arrangement as a part of an attempt to monopolize or restrain trade on the part of Shamrock. The admission would be subject, however, to the introduction of some evidence of a tying arrangment. There was no proffer of evidence to show such a tying arrangement at the time this evidence was excluded nor at any other time. Thus the error was in the abstract and harmless.

The third item of evidence is a group of letters and memoranda having to do with the effort of Cameron to obtain a loan from the First National City Bank of Houston, Texas, with which to finance their proposed pipeline. The fact of attempting to obtain this loan was stipulated. There was also full testimony regarding the effort. Plaintiffs wished to put in such portions of the letters and memoranda as would reflect Phillips' alleged antagonism to the proposed pipeline and as would provide a basis for an inference that the loan was not made because of Phillips' influence over the bank. The district court excluded this evidence on grounds that the documents contained hearsay, as well as self serving opinions and conclusions on the part of a Cameron agent. With these objectionable portions removed from the documents, the court was of the opinion that nothing of coherent value would remain to be considered by the jury.

This evidence consisted of twelve letters and three memoranda prepared by Cameron's agent and one letter from an officer of the Houston bank regarding Cameron's application for the loan. The court properly

refused to admit the conclusions and opinions of Cameron's agent which were contained in the letters and memoranda. They were not admissible under the Business Records Act, 28 USCA, § 1732(a); *Standard Oil Company of California v. Moore*, 9 Cir., 1957, 251 F.2d 188, 213-14. No effort was made by plaintiffs to introduce the documents with the conclusions and opinions deleted and thus we need not consider whether the remaining documents or parts thereof qualified as an exception to the hearsay rule under the Business Records Act. The court did not err in excluding this evidence.

There is one other item of excluded evidence concerning which plaintiffs assign error but it goes to the question of damages. As will be seen, we do not reach the question of damages and thus it is unnecessary to consider this assignment of error.

III.

We now turn to question whether the court erred in directing verdicts for defendants or either of them. The test to be applied is the now familiar one of *Boeing Company v. Shipman*, 5 Cir., 1969, 411 F.2d 365 (en banc), where we said:

> "On motions for directed verdict ... the Court should consider all of the evidence — not just that evidence which supports the non-mover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and infer-

ences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury." 411 F.2d at 374.

Phillips and Shamrock were integrated oil companies in that they owned and operated refineries in the geographical area with which we are concerned. They transported their own production as well as the production of others to their refineries. The transportation was by their subsidiary pipeline companies. Cameron had no production but purchased from others for transportation over Panotex, its subsidiary, to Shell's pipeline.

It is a fact also that a pipeline tends to be a natural monopoly. Plaintiffs offered testimony to the effect that the first pipeline into an area customarily gets the connections that are available in the oil fields. If two lines enter at about the same time, they are likely to divide the available production. In addition, a trucking operation is not competitive with a pipeline.

As the Supreme Court has noted, *Federal Trade Commission v. Cement Institute*, supra; *Standard Oil Co. v. United States*, 1911, 221 U.S. 1, 46, 31 S.Ct. 502,

55 L.Ed. 619, evidence as to events prior to and following alleged antitrust activity is admissible if it tends to show the purpose and character of particular transactions under investigation. Thus it is that the charges against defendants must be viewed in the background of the facts as they existed prior to entry of Cameron and Panotex into the pipeline market; indeed prior to the creation and construction of Panotex.

Background and Relevant Markets

The controversy involves competition between three pipelines, Phillips, Shamrock and Panotex, in the general area of the Texas-Oklahoma border. Oil situated in two counties in Oklahoma is involved: Beaver and Texas Counties. These counties border on the north boundary of the State of Texas. Oil situated in ten Texas counties lying immediately south of these Oklahoma counties is also involved. The counties are Hansford, Ochiltree, Lipscomb, Moore, Hutchinson, Roberts, Hemphill, Carson, Gray and Wheeler.[2]

Phillips' refinery is in Hutchinson County. Shamrock's refinery is in Moore County. As of 1954, the crude oil for these refineries was supplied out of the Texas panhandle oil field, in Moore, Hutchinson, Roberts, Carson, Gray and Wheeler Counties. The reserves in this field were becoming inadequate to meet the needs of the refineries. New fields were being developed in the counties to the north and east. By 1957, Shamrock

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[2]See Appendix A attached for a map of the general area and the pipelines pertinent to this litigation.

had extended its pipeline north into fields located in Hansford and Ochiltree Counties. Phillips remained in the panhandle.[3]

By 1961, Phillips had extended its pipeline through the southeast corner of Hansford County to connect one field, and on through Ochiltree County to connect with several fields and into Texas and Beaver Counties in Oklahoma (the Camrick area) to connect with fields there. Its pipeline crossed that of Shamrock in Ochiltree County.

In 1961, Cameron was engaged in purchasing crude oil in the Camrick area of Texas and Beaver Counties and transporting it by truck for resale. The Phillips pipeline extension into the Camrick area brought about a considerable reduction in Cameron's trucking business but that reduction is not a basis of the claim here.

In 1963, Mobil Oil, a company not involved in the controversy here, extended its pipeline into the Camrick area from the north.

The area to the east of these lines, in Texas and Oklahoma was undeveloped. Thereafter, beginning in 1963, fields were developed in this eastern area, in Beaver County, Oklahoma, and in Lipscomb County and in the north part of Hemphill County, in Texas.

By August 1963, Shamrock had extended its pipeline eastward into this new area in Lipscomb County to

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[3]By 1968, Shamrock had extended its line to southern Colorado to obtain oil for its refinery.

connect with the Frass and W. Follett fields. This was pre-Panotex.

During this year of 1963 the Panotex pipeline was conceived by Cameron and commitments from producers were being obtained. Primary equity financing was obtained in late 1963 from Alliance Business Investment Company. In February 1964 a loan was sought from the Houston bank. This effort was unsuccessful and financing was sought and obtained in New York in July 1964. Panotex came into corporate existence in July 1964, its line was commenced in October 1964 and became operative in January 1965.

Meanwhile, as Cameron's president discovered in 1963, Phillips was soliciting commitments from purchasers in 1962 in the Oklahoma part of the Texas-Oklahoma area where Cameron began solicitations in 1963. These solicitations were for production as far east as the Logan area in Beaver County, Oklahoma. Phillips had considerable production of its own in the Como area and was trucking six to seven thousand barrels of oil per day from there to Camrick. This oil amounted to approximately ten per cent of the capacity of Phillips' refinery.

Cameron testified that he began looking at this area after his Camrick trucking operation declined in 1961. His idea was that new pools of oil would be developed in this eastward territory in Beaver and Lipscomb Counties and this proved to be the case in the next few years.

This brings us to the relevant markets. Plaintiffs tried the case on the theory of three relevant markets. We will consider the case on that basis and without determining the correctness of the delineation.

Area I, according to plaintiffs' theory of suit, is the Camrick area, heretofore described. It was served by Phillips' pipeline beginning in 1961 and by Mobil beginning in 1963. Panotex has never entered this market.

Area II is south Beaver County and mainly the Balko, Elmwood and Como fields in that county. Phillips extended its pipeline east through the Balko and Elmwood fields and to Como in September 1964. Panotex constructed its line westward through these fields in January 1965. Prior to these extensions, Cameron and Phillips were advised of what the other proposed to do.

Shamrock served neither Area I or II by pipeline. Phillips does not serve Area III. Area III consists of the Logan field in Beaver County, Oklahoma and all of Lipscomb County, and the Feldman field in Hemphill County, Texas. It is served by Shamrock and Panotex. The Panotex line began at the Shell pipeline at Elk City in Beckham County, Oklahoma, considerably southeast of the areas in question, and thence extended in a northwesterly direction into fields in Lipscomb and Hemphill Counties, Texas, namely the Feldman, West Higgins, Kelln and Mathers field. It is to be noted that Panotex had a monopoly in these fields until 1968 when Shamrock entered Kelln and West Higgins. The Cranford, Bishop and West Durham fields had

been developed along the line of Panotex by 1968 and were served exclusively by Panotex.

The line of Panotex continued northwesterly to reach the Lipscomb and Bechthold fields in Lipscomb County, Texas, and the Loan [sic Logan] field in Beaver County, Oklahoma. It appears that Shamrock reached the Lipscomb field in August 1963 and extended to the Logan and Bechthold fields in August 1964. Shamrock, prior to its extension and the entry of Panotex, had been purchasing oil from the Logan area from a trucker who served the area.

The Case Against Phillips and its Subsidiary

The issue presented is the foreclosing or restriction of a competitor, Cameron-Panotex. The claim is premised on conduct of Phillips, acting alone or in league with its pipeline subsidiary or with Shamrock.

We begin by eliminating Area I. Panotex is not in Area I. Phillips has been there since 1961. Cameron-Panotex makes no case whatever from a factual standpoint on being foreclosed from or restrained in Area I, either through an attempted monopoly or by way of a restraint. The facts at best show only that Area I had no pipeline service until 1961 when Phillips entered. There is no evidence that Cameron-Panotex ever considered entering Area I after the entry of Phillips. The evidence demonstrates no more than a normal business venture on the part of Phillips in entering Area I (Camrick). The issue narrows to Areas II and III.

Area II consists of only three fields, Balko, Elmwood and Como. They are served by Phillips and Cameron-Panotex. Phillips extended east from Area I in September 1964 and Panotex commenced service in January 1965. Phillips had solicited commitments in Area II in 1962 according to Cameron. It was trucking oil out of the area and had production of its own on 16,000 acres of leases in the Como area. Phillips also solicited in the Logan field in Area III. Cameron began solicitations in the area in 1963. There was no previous pipeline service to Area II. Phillips had little success in obtaining commitments.

The evidence disclosed that plaintiffs were purchasing 100 per cent of the Balko production, most of the Elmwood production, fifty per cent of the Como production (Phillips had some production), and all of the Logan production except for one producer. This was the situation immediately upon the completion of the Panotex line and plaintiffs obtained all of the oil that was committed to them. In the ensuing years, Panotex has obtained all new production in Area II and at Logan. Phillips has not connected to a new lease since 1964.

When Cameron announced in 1964 that it had received financing, Phillips met Cameron's price and contract terms. Its prior offers had been higher and its contract terms more stringent. In addition, Phillips agreed with its pipeline subsidiary to guarantee it a seven per cent return on investment as a condition of a pipeline extension into Area II. The commitments of Phillips, according to plaintiffs, were insufficient

to produce such a return. It does appear that the commitments were less than the number theretofore insisted upon by the Phillips pipeline subsidiary. There is no proof, however, that the extension was unprofitable and thus something from which an inference of predatory conduct could be drawn. In meeting the Panotex competition, Phillips took three simultaneous steps: (1) it met Cameron's price offer; (2) it met Cameron's contract requirements as to period of contract; (3) it guaranteed its pipeline subsidiary a seven per cent return so as to replace its trucking operation with a pipeline. The proof stops here. It goes no further than to show that Phillips needed the oil for its refinery and would be preempted by the entry and consequent monopoly of another pipeline. It is true that the evidence shows that Phillips considered Area II as "its own backyard" and sought to protect its position in the area. This, however, amounts to nothing more than a proper business motive under the circumstances. Cf. *Times-Picayune Publishing Company v. United States*, 1953, 345 U.S. 594, 627, 73 S.Ct. 872, 97 L.Ed. 1277, on the necessity to prove something more than a "step predominantly motivated by legitimate business aims ..." to show an intent to monopolize.

At this point we find that the evidence of a conspiracy between Phillips and its pipeline subsidiary is nonexistent from the point of showing a violation of §§ 1 or 2 of the Sherman Act.

This is likewise true as to showing an attempt to monopolize on the part of Phillips. Assuming *arguendo*, intent and a relevant market, a dangerous probability

of success is clearly lacking. See *Cliff Food Stores, Inc. v. Kroger, Inc.*, 5 Cir., 1969, 417 F.2d 203, 206-08.

The action of Phillips in extending into Area II did not rise above a protective motive. Phillips was already present through a trucking operation and through its own production. Panotex was transporting in another direction and away from Phillips' refinery. Protection of its refinery by the assurance of some of the oil reserves in Area II was no more than a normal business practice absent conduct calculated to bar the entry of a competitor into Area II or to drive a competitor out of the area. The proof disclosed no such conduct on the part of Phillips. There was no proof of predatory conduct or of conduct which was illegal per se. It follows that the proof was insufficient to make a jury question as to a restraint of trade by Phillips from the conduct disclosed to this point.

Plaintiffs urge that Phillips violated the Sherman Act by allegedly blocking Cameron's application for a loan from the Houston bank with which to construct Panotex. The Chairman of Phillips happened to be a director of the bank. Phillips had been a long time large depositor in the bank. The other side of the coin is that the loan was never formally rejected although some five months of negotiations took place. The bank was troubled by the probability of success of the venture, considering competitive pipelines in the proposed Panotex area and the status of Cameron's commitments. There is no evidence that Phillips influenced by word or deed the decision not to make the loan. There the matter ends. A Phillips officer on the bank

board and a Phillips deposit in the bank will not suffice as a base for an inference of loan influence and in turn, for an inference of an antitrust violation. The bank sent a consultant to discuss the prospects of Panotex with Phillips and Phillips advised that it intended to compete for the oil. This was a business judgment in line with the needs of its refinery. Phillips was not willing to give up the area where it competed to Panotex.

There is one other charge against Phillips and it stems from an alleged division of markets as between Shamrock and Phillips. This will be considered following the discussion of the case against Shamrock.

The Case Against Shamrock and Its Subsidiary

There is no evidence that Shamrock conspired with its pipeline to restrain trade or to monopolize. The competing lines were simply built either prior to the entry of Panotex or after the entry of Panotex. The subsidiary pipeline did no more than build lines, set prices and make purchases. Shamrock's prices were uniform throughout the Shamrock system except in one instance. This one instance occurred for a short time in the Logan and Bechthold fields. Shamrock first attempted to pay producers a price less than that paid by Cameron. When Cameron obtained commitments from eighty per cent of the producers, Shamrock raised its net offer to the producers. After this price increase, Shamrock's price, while exceeding that of Cameron by two cents per barrel, was uniform with its prices throughout the remainder of its system.

Moreover, Cameron had contracts with its producers to hold them providing it met the prices of others.

The competition between Panotex and Shamrock was all in Area III. By and large, as stated, Shamrock was in this area prior to the entry of Panotex and, like Phillips, was seeking oil for its refinery. There is no evidence that the conduct of Shamrock or its subsidiary exceeded a protective position. It competed with Panotex for oil but without predatory action. It engaged in no conduct which can be described as illegal per se under the Sherman Act. The proof is clear that there was no dangerous probability of a monopoly.

We conclude that the evidence was insufficient to make jury issues on the charges against Shamrock to this point.

The Alleged Phillips-Shamrock Conspiracy

The proof was that Phillips and Shamrock had been competing in the general area involved for more than 40 years. There was evidence as to specific examples of competition between them. Plaintiffs' case, however, comes down to evidence of a telephone conversation between Phillips and Shamrock, made to Phillips by Shamrock in 1964, wherein Shamrock inquired whether Phillips had any interest in extending into the Logan area. Phillips answered that it did. Shamrock replied that it too would also have to go into Logan and that "it won't be the first time we have been competitors."

Plaintiffs make much of the fact that Shamrock extended to Logan and Phillips did not. Phillips went no further east than the Como field in Area II while Shamrock went no further west than Logan. Standing alone, this might give rise to an inference of a division of markets between Phillips and Shamrock to the detriment of their mutual competitor, Panotex. But this evidence does not stand alone.

Phillips had been seeking commitments in the Logan area without success. Panotex had every producer in the field except one. Shamrock acquired that one. The interest of Phillips was such that it staked a right of way into Logan but abandoned the prospect for lack of business.

Phillips had production of its own in the Como field and some additional suppliers. These facts gave good reason for Phillips to stop at Como and for Shamrock to stop at Logan. They established a basis for a business judgment resting on the idea that a certain amount of production was necessary to warrant the expense of extending the pipelines. Any inference of a division of markets must give way to these facts.

This case began in 1964. It has been strenuously developed through discovery and otherwise. It occupied more than two weeks of trial time. In the end there is no substance to plaintiffs' claims. Under the test of viewing the evidence in the light most favorable to plaintiffs and giving them the benefit of all inferences which might reasonably be drawn from estab-

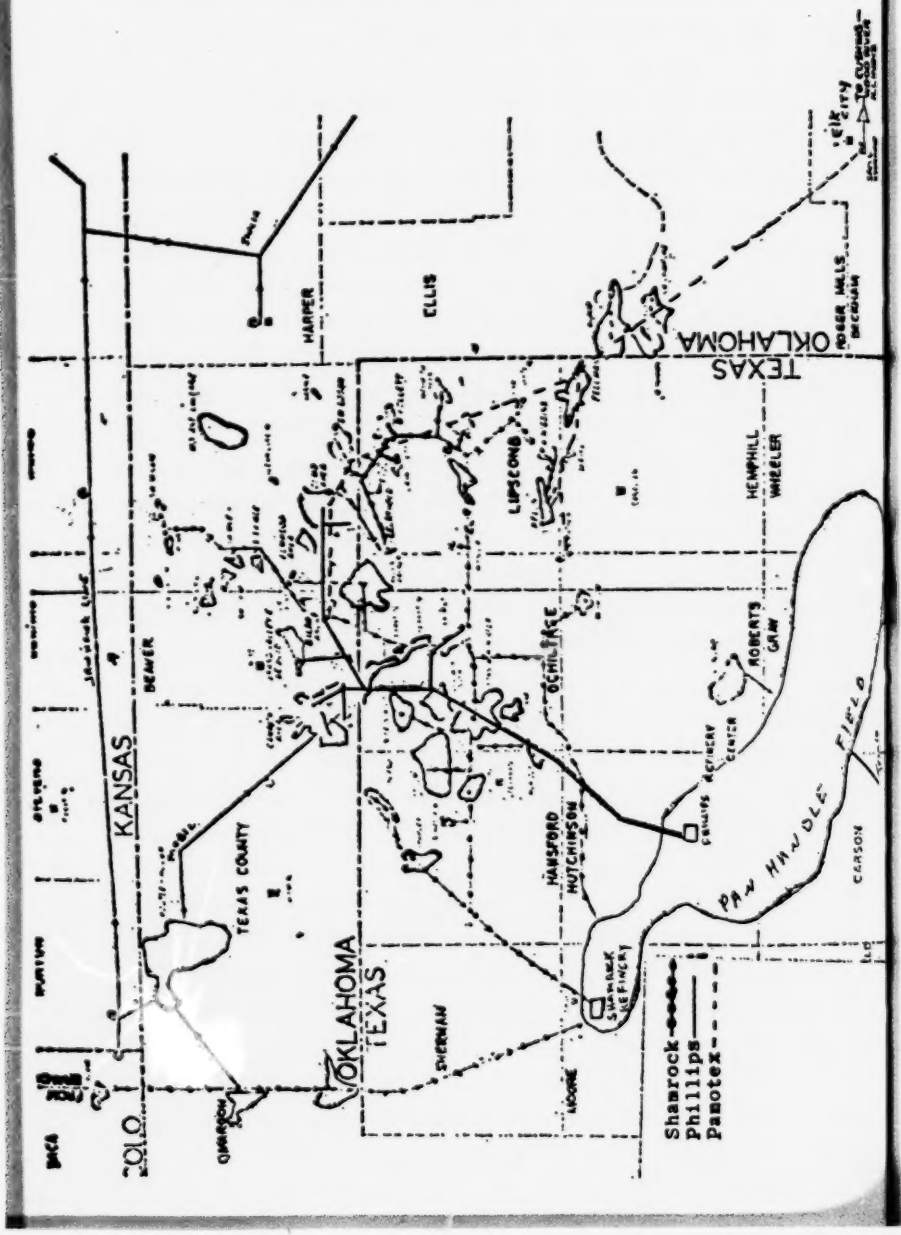
lished facts, we have nothing more than competition between the parties.

It seems implicit in plaintiffs' position that they view the law as protecting them from competition, whether from those already in the market or from newcomers to the market. This is not the law, and the fact that a pipeline can be a natural monopoly does not mean that it is protected from competition. The Sherman Act fosters competition by protecting it from illegal restraints and monopoly power. *Northern Pacific Railway Company v. United States*, 1958, 356 U.S. 1, 4-5, 78 S.Ct. 514, 2 L.Ed. 2d 545. Plaintiffs, of course, are protected to this extent. However, after having considered all of the evidence and every contention made by plaintiffs, we find no evidence of an illegal restraint or of a proscribed attempt to monopolize on the part of defendants, individually or collectively. The record is one of allowable competition — nothing more.

We hold that the district court did not err in directing verdicts for Phillips and Shamrock.

AFFIRMED.

PANOTEX v. PHILLIPS PETROLEUM CO.
APPENDIX "A"



1. CONSTITUTION OF THE UNITED STATES: Amendment 7:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATUTES

Section 1 of the Sherman Act, 15 U.S.C. § 1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair

method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

Section 2 of the Sherman Act, 15 U.S.C. § 2.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

Section 4 of the Clayton Act, 15 U.S.C. § 15.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

Section 16 of the Clayton Act, 15 U.S.C. § 26.

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. Oct. 15, 1914, c. 323, §16, 38 Stat. 737.

Federal Rules of Civil Procedure, Rule 50

Rule 50. Motion for a Directed Verdict

(a) *Motion for Directed Verdict: When Made; Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific ground therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) *Motion for Judgment Notwithstanding the Verdict.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) *Same: Conditional Rulings on Grant of Motion.* (1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal subsequent proceedings shall be in accordance with the order of the appellate court.

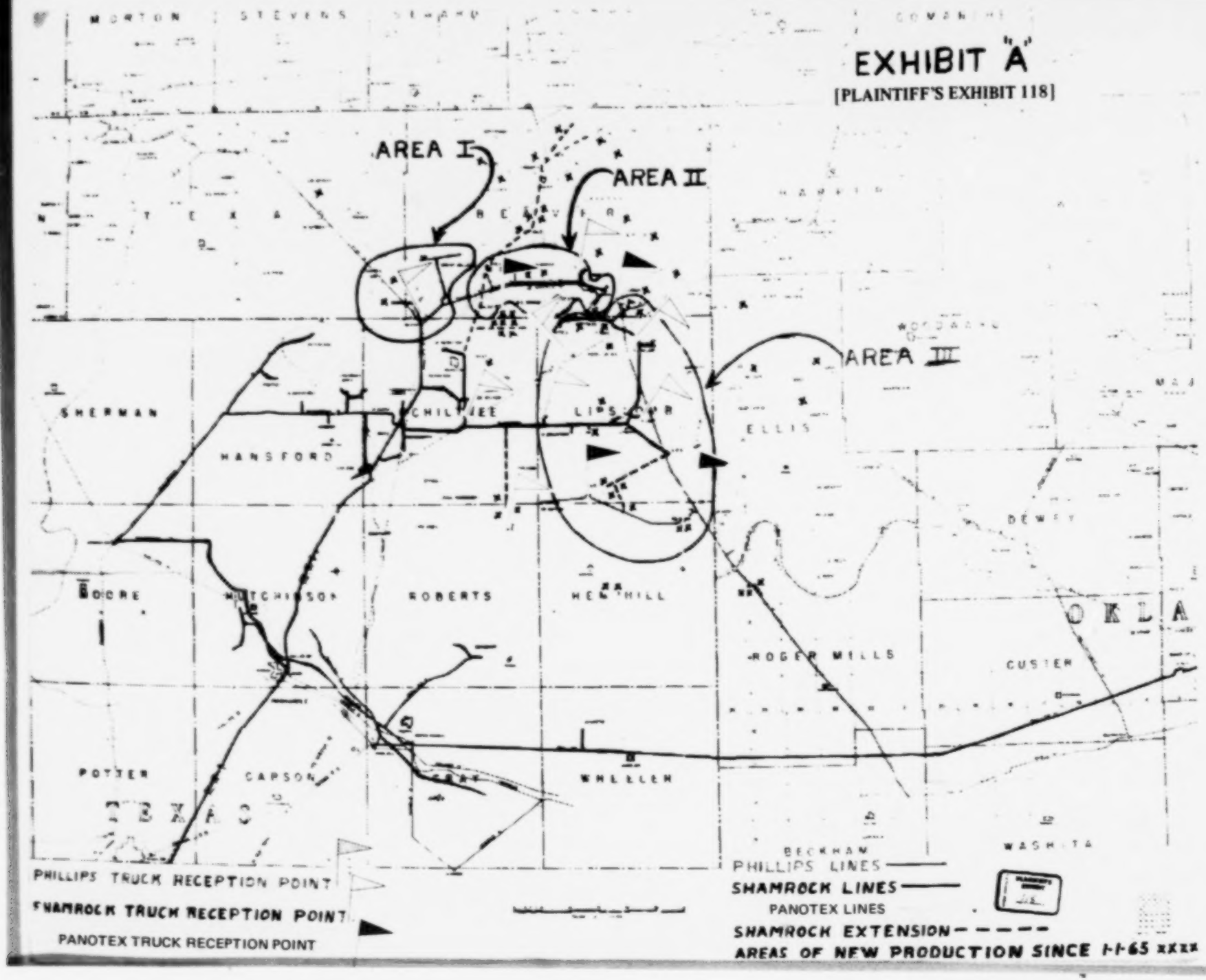
(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) *Same: Denial of Motion.* If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

As amended Jan. 21, 1963, eff. July 1, 1963.

EXHIBIT "A"

[PLAINTIFF'S EXHIBIT 118]



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JUN 14 1972

MICHAEL ROD

In the

Supreme Court of the United States

October Term, 1971

No. 71-1504

PANOTEX PIPE LINE COMPANY AND
CAMERON CRUDE OIL CORPORATION,
Petitioners,

v.

PHILLIPS PETROLEUM COMPANY AND
DIAMOND SHAMROCK CORPORATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

DIAMOND SHAMROCK CORPORATION'S BRIEF IN OPPOSITION

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DIAMOND SHAMROCK CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

DIAMOND SHAMROCK CORPORATION'S BRIEF IN OPPOSITION

This brief is submitted by Diamond Shamrock Corporation, formerly The Shamrock Oil and Gas Corporation, one of the separate unrelated corporate defendants, respondents herein, for convenience hereinafter called "Shamrock".

OPINION BELOW

The opinion of the Court of Appeals is not yet reported, but is set forth in the Appendix (App.) to this Brief (1a to 24a). References to the attached opinion will be designated (Opn. App. .....).

PRELIMINARY STATEMENT

Petitioners seek to support their petition by restating and rearguing the evidence and inferences to be drawn therefrom and by injecting into the case factual claims which were not found to exist or which were found contrary to petitioners' assertions. Thus, a review of the evidence by this Court is necessary if it is to consider petitioners' questions. It has been the long standing policy of this Court that certiorari will not be granted to review evidence and inferences drawn therefrom and to discuss specific facts. [1]

This case does not present a situation requiring this Court to grant or one that would justify this Court in granting certiorari to review and examine the evidence and findings of fact as petitioners would have the Court do. This is true because the facts involved are of a peculiar and limited nature. Thus decisions of the lower courts are of limited application restricted to the same or similar fact situations and are not of a recurring nature or of public interest.

The courts below held that the verdicts were respectively directed and affirmed following a review of the evidence in a light most favorable to petitioners, and after giving them the benefit of all reasonable inferences that could be drawn from the established facts from which both courts concurred in finding and concluding that reasonable men could not differ as to the result. After such review, the Court of Appeals stated multiple legal grounds for disposing of petitioners' claimed error. Petitioners' questions, however, disregard the various independent legal

[1] "We do not grant a certiorari to review evidence and discuss specific facts." United States of America v. Johnston (1925), 268 U.S. 220, 227. "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." General Talking Pictures Corporation v. Western Electric Company (1938), 304 U.S. 175, 178. To like effect are, Southern Power Company v. North Carolina Public Service Company (1924), 263 U.S. 508, 509; Houston Oil Company v. Goodrich (1918), 245 U.S. 440, 441.

grounds upon which the Court of Appeals predicated its ultimate decision. Petitioners have merely presented three abstract questions. To reach any of the questions for decision, this Honorable Court would be forced to review the evidence and disregard the findings of the Court of Appeals which support the ultimate decision of both lower courts.

Petitioners' questions must be restated in the context of the case involved, and when so restated are as follows:

QUESTIONS PRESENTED
(As Restated by this Respondent)

I.

Should this Court grant certiorari to review, and review a question of whether the Court of Appeals erred in affirming a directed verdict granted for defendant Shamrock during the presentation of defendant Phillips' case in chief, where both lower courts found that there was no evidence to raise a material fact issue for the jury, considering all of the evidence and viewing it in the light most favorable to plaintiffs and giving plaintiffs the benefit of all inferences reasonably drawn from the established facts, and where plaintiffs failed to object to the timing of the verdict, and failed to demonstrate any prejudice flowing from the timing of the verdict.

II

Whether the Court of Appeals' reference to lack of proof of "dangerous probability of success" creates a material conflict of holding with other cases such as to require or justify certiorari and review, when the court below also found no illegal intent to monopolize, no predatory conduct and no act that was illegal per se on the part of the defendants.

III.

Whether an agreement between a parent corporation and its subsidiary corporation to carry out the normal business pur-

poses of the corporations is evidence of an illegal conspiracy where there was no evidence that such conduct was with intent to monopolize or was independently illegal or constituted a "per se" violation of the antitrust law.

STATEMENT OF THE CASE

Except for the opening paragraph stating how this suit originated, petitioners' Statement of the Case is an attempt to have this Court review evidentiary questions either found against petitioners or not presented by the record. Shamrock submits the following Statement of the Case based upon and primarily referenced to the findings and opinion of the Court of Appeals, which findings petitioners ignore rather than challenge.

The trial court directed verdicts for the defendants Shamrock (A. 1154, 1189-90) and Phillips (A. 1195-97) after the plaintiffs had completed their testimony and while Phillips was putting on its case in chief, but before Shamrock started its case in chief. The trial court found (A. 1154 and 1215), after viewing all of the evidence in the light most favorable to plaintiffs and giving them the benefit of all inferences that might be reasonably drawn from established facts, that reasonable men could not differ on the result, and accordingly separate verdicts were directed for both Shamrock and Phillips.

The Court of Appeals concluded, after applying the same test, that the evidence showed nothing more than legitimate competition between the parties (Opn. App. 22a, 23a), and that after considering all the evidence and every contention made by plaintiffs, that it could

> "[F]ind no evidence of an illegal restraint or of a proscribed attempt to monopolize on the part of defendants, individually or collectively." (Opn. App. 23a).

The Clerk of the Court of Appeals has forwarded to this Court at Shamrock's request Vol. I APPELLEES' SUPPLEMENTAL

APPENDIX filed in the Court of Appeals. Such volume contains colored reproductions, on a reduced scale, of Exhibits, received in evidence without objection (A. 902, 916-917) and identified as PPCo. Ex. 1, PPCo. Ex. 2 and the First through Eighth overlays to PPCo. Ex. 2. PPCo. Ex. 1 is the same or similar map, except in color, as was attached to the opinion by the Court of Appeals (Opn. App. 24a) and shows the Oil Gathering Systems as of September 8, 1968. PPCo. Ex. 2 reflects the chronological extensions of the Shamrock and Phillips lines.

The reproductions of these unchallenged and undisputed maps are helpful in understanding the fact situation, as it undeniably existed, and why the Court of Appeals found:

As to Shamrock,

> "There is no evidence that Shamrock conspired with its pipeline to restrain trade or to monopolize. The competing lines were simply built either prior to the entry of Panotex or after the entry of Panotex." (Opn. App. 20a)
>
> "There is no evidence that the conduct of Shamrock or its subsidiary exceeded a protective position. It competed with Panotex for oil but without predatory action." (Ops. App. 21a); and

as to Phillips,

> "The action of Phillips in extending into Area II did not arise above a protective motive. * * * There was no proof of predatory conduct, or of conduct which was illegal per se." (Opn. App. 19a).

The map marked PPCo. Ex. 2 shows the locations of the Shamrock refinery in Moore County and the Phillips refinery in Hutchinson County, each being in the Panhandle Oil Field where both Shamrock and Phillips initially obtained the supply of oil needed to meet the requirements of their respective refineries. As of 1954, the crude oil reserves in the Panhandle Oil Field were becoming inadequate to meet the needs of these refineries (Opn. App. 12a).

New fields were being developed to the north and east in Hansford and Ochiltree Counties, Texas, and by 1957 Shamrock had extended its pipeline north into fields located in Hansford and Ochiltree Counties to supply oil for its refinery (Opn. App. 12a and 13a). See also PPCo. Ex. 2, First Overlay.

By 1961 Phillips had extended its pipeline northward through the southeast corner of Hansford County to connect one field and through Ochiltree County to connect several fields in Texas and Beaver Counties, Oklahoma (Cameron area). Phillips' line crossed Shamrock's line in Ochiltree County (Opn. App. 13a). See also PPCo. Ex. 2, Second Overlay and Third Overlay.

By 1963 Shamrock had extended its pipeline eastward into the new area in Lipscomb County to connect the Frass and Follett fields. "This was pre-Panottx." (Opn. App. 13a and 14a). See also PPCo. Ex. 2, Fourth overlay.

Panotex Pipe Line Company was not incorporated until July of 1964 (Opn. App. 14a). Construction of its pipeline extending northwesterly from Elk City, Oklahoma, across the corner of Hemphill and through Lipscomb Counties, Texas, and into Beaver and Texas Counties, Oklahoma (see map Opn. App. 24a), was not commenced until October, 1964, and it did not become operative until January, 1965 (Opn. App. 14a). See also PPCo. Ex. 1 and PPCo. Ex. 2, Fifth and Sixth overlays.

The Shamrock pipeline reached the Lipscomb County field in 1963, and extended a short distance to the Logan and Bechtold fields in August, 1964. Prior to its extension into Logan and the entry of Panotex, Shamrock had been purchasing oil from the Logan area from a trucker who served the area. (Opn. App. 16a). See also PPCo. Ex. 2, Fourth and Fifth overlays.

The Panotex line was extended into the Feldman, West Higgins, Kelln and Mathers field in southern Lipscomb and northern Hemphill Counties, Texas, but as stated by the Court of Ap-

peals: "It is noted that Panotex had a monopoly in these fields until 1968 when Shamrock entered Kelln and West Higgins." (Opn. App. 15a). See also PPCo. Ex. 2, Sixth and Seventh Overlays.

Plaintiffs' Exhibit 118, forwarded to this Court at the request of petitioners and reproduced as Addendum 1 to the Petition, designates three areas called Areas I, II and III. Petitioners tried the case on the theory that such three areas were the relevant markets. The Court of Appeals considered the case on that basis without determining the correctness of the delineation (Opn. App. 15a). As shown, Area III covers Lipscomb and the northern part of Hemphill Counties, Texas. As found by the Court of Appeals, it was only in this Area III where Shamrock and Panotex competed (Opn. App. 21a). The fact that Shamrock had extended its line into Lipscomb County more than a year before Panotex's incorporation and entry into Lipscomb County cannot be questioned (Opn. App. 13a, 14a, 21a). See also PPCo. Ex. 2, Fourth overlay.

Prior to the construction of the Panotex pipeline, Cameron had, beginning in 1963, solicited and obtained commitments from 80% of the producers (Opn. App. 20a). Cameron's contracts with the producers held them to their commitments, provided Cameron met the price of others (Opn. App. 21a).

Immediately following the completion of the Panotex line, the plaintiffs had obtained all of the oil that was committed to them, including all of the oil from the Logan area, except from one producer who was not committed to Cameron (Opn. App. 17a and A. 230-231). In the ensuing years, Panotex obtained all new production in Area II, where Shamrock did not compete, and in the Logan area, where Shamrock had sought to compete and where it, except for the one producer who was not committed to Cameron, was unsuccessful. (Opn. App. 17a).

The Court of Appeals found there was no evidence that

Shamrock conspired with its subsidiary pipeline corporation (The Shamrock Pipe Line Corporation) to restrain trade or to monopolize. The competing lines were simply built by such subsidiary of Shamrock either *prior* to the entry of Panotex Pipe Line or *after* the entry of Panotex Pipe Line into Area III, where Shamrock and Panotex competed (Opn. App. 20a).

That Shamrock was in Area III prior to the entry of Panotex and was seeking oil for its refinery was apparent from undisputed evidence and was so found by the Court of Appeals (Opn. App. 13a, 14a, 21a). See also PPCo. Ex. 2, Fourth overlay. This respondent submits it is equally indisputable, as found by the Court of Appeals, that Shamrock competed with Panotex for oil without predatory action and that it engaged in no conduct that could be described as illegal per se under the Sherman Antitrust Act, and that the proof is clear that there was no dangerous probability of a monopoly (Opn. App. 21a).

Assuming, as claimed by petitioners, the areas designated I, II and III on Plaintiffs' Exhibit 118 are the relevant markets, it is obvious from such exhibit of plaintiffs, and as found by the Court of Appeals, that neither Shamrock nor Panotex competed in or entered Area I (Opn. App. 15a). Area II is in south Beaver County, Oklahoma, and consists mainly of the Balko, Elmwood and Como fields in that area. Phillips extended its pipeline east through Balko and Elmwood to the Como field in December, 1964. Panotex extended its line westward through these fields in January of 1965. Prior to these extensions, Cameron and Phillips were advised of what the other proposed to do (Opn. App. 15a).

Area II, consisting of the three fields, Balko, Elmwood and Como, was served by both Phillips and Panotex. Phillips had solicited commitments in Area II in 1962 according to Cameron. It was trucking oil out of the area and had production of its own on 16,000 acres of leases in the Como area. Cameron

began solicitations in Area II in 1963 where there was no previous pipeline service. Phillips also solicited in the Logan field in Area III, but had little success in obtaining commitments (Opn. App. 17a).

Immediately upon the completion of the Panotex line, the plaintiffs were purchasing 100% of the Balko production, most of the Elmwood production, 50% of the Como production (Phillips had some production) and as previously noted all of the Logan production except for one producer who was uncommitted to Cameron and which connection Shamrock obtained (Opn. App. 17a).

The plaintiffs claimed that the extension of the Phillips pipeline was uneconomical, but the Court of Appeals found (Opn. App. 18a) that there was no proof that the extension was unprofitable and hence no inference of predatory conduct could be drawn therefrom. The Court of Appeals concluded there was no evidence of a conspiracy between Phillips and its subsidiary and likewise found that there was no evidence of an attempt to monopolize on the part of Phillips or a dangerous probability of success (Opn. App. 18a).

As to Shamrock and its subsidiary, the Court of Appeals found:

> "The competition between Panotex and Shamrock was all in Area III. By and large, as stated, Shamrock was in this area prior to the entry of Panotex and, like Phillips, was seeking oil for its refinery. There is no evidence that the conduct of Shamrock or its subsidiary exceeded a protective position. It competed with Panotex for oil but without predatory action. It engaged in no conduct which can be described as illegal per se under the Sherman Act. The proof is clear that there was no dangerous probability of a monopoly." (Opn. App. 21a).

As to the alleged conspiracy between Phillips and Shamrock, the Court of Appeals found that Phillips and Shamrock had been

competing in the general area for more than 40 years and that they competed for oil in the Logan field (Opn. App. 21a, 22a). Phillips had been seeking commitments in the Logan field without success. Panotex got every producer in such field except the one acquired by Shamrock. Phillips' interest was so great that it staked a right-of-way into the Logan field, but abandoned the prospect for lack of business. Phillips had its own production in the Como field and other additional supplies. These facts gave good reasons for Phillips to stop at the Como field and for Shamrock to stop at Logan, particularly when Panotex had commitments from all of the producers in the Logan field except one and had commitments from all of the producers in the Como field except those held by Phillips. No inference of a division of markets between Shamrock and Phillips can be drawn from these facts (Opn. App. 22a).

The Court of Appeals correctly analyzed the claim of petitioners as it was presented in the trial court and in the Court of Appeals (and as it is renewed in the Petition filed herein) as follows (Opn. App. 23a):

> "It seems implicit in plaintiffs' position that they view the law as protecting them from competition, whether from those already in the market or from newcomers to the market. This is not the law, and the fact that a pipeline can be a natural monopoloy does not mean that it is protected from competition. The Sherman Act fosters competition by protecting it from illegal restraints and monopoly power. Northern Pacific Railway Company v. United States, 1958, 356 U.S. 1, 4-5, 78 S. Ct. 514, 2 L. Ed. 2d 545. Plaintiffs, of course, are protected to this extent. However, after having considered all of the evidence and every contention made by plaintiffs, we find no evidence of an illegal restraint or of a proscribed attempt to monopolize on the part of defendants, individually or collectively."

The Court concluded, based on the record before it:

> "The record is one of allowable competition — nothing more." (On. App. 23a)

Certiorari should not be granted to review evidence and discuss the facts as petitioners would have this Honorable Court do.

ARGUMENT

I.

ANY SO-CALLED PROCEDURAL ERROR, COMMITTED IN THE TIMING OF THE DIRECTED VERDICTS WAS WAIVED BY PETITIONERS, WHO WERE NOT PREJUDICED BY SUCH TIMING.

The Court of Appeals found it unnecessary to reach the question of whether Rule 50(a)[2] prohibits the granting of a directed verdict during the presentation of defendant's case. Rather, the Court held petitioners had failed to demonstrate any harm flowing from the timing of the verdict and the facts clearly show a waiver by petitioners of any such claimed error. As stated by the Court of Appeals:

> "At no time during the proceeding did plaintiffs offer any objection whatever to the timing of the directed verdicts. Moreover, nothing was said during the proceeding which pointed to any prejudice to plaintiffs from the standpoint of timing." (Opn. App. 4a).

Petitioners do not here challenge such finding and determination

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[2] FEDERAL RULES OF CIVIL PROCEDURE
"Rule 50.
"MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT
"(a) Motion for Directed Verdict: When Made; Effect. "A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury."

by the Court of Appeals. This Honorable Court should not be called on to look further.

Petitioners had ample opportunity to object in the trial court to the timing of the directed verdicts at a time when the trial court could have prevented what the petitioners now claim to be a procedural error. Prior to the granting of the directed verdicts, but after what the Court intended doing became known, there was a long colloquy between the court and counsel, out of the presence of the jury (Opn. App. 3a, A. 1144-1197). No claim of prejudice was made by petitioners because of such timing and no offer was made of any proof that would show how petitioners would be prejudiced by the timing of the directed verdicts. Because of such failures, petitioners clearly waived any so-called procedural defect and this Court should not be called upon to exercise its discretion to review such claimed procedural error, particularly where the petitioners, as found by the Court of Appeals, were not prejudiced thereby.

The Court of Appeals pointed out (Opn. App. 4a) that at a hearing on the form of the final judgment a month after the verdicts were instructed, plaintiffs took the position for the first time that they were prejudiced by the timing of the granting of the motions in that they had previously reserved the right to redirect examination of certain witnesses. The Court of Appeals found "The record does not reflect this reservation. The court, in fact, required plaintiffs to complete their case prior to closing." (Opn. App. 4a).

Such claim of reserved right to reexamine witnesses was not urged in the Court of Appeals (Opn. App. 4a and 5a), nor is it claimed here by petitioners. On the contrary, the petitioners claimed in the Court of Appeals and assert herein, as described and discussed in the following paragraph, the right to rebut certain evidence there described.

In the Court of Appeals petitioners claimed, as they now do

on page 4 of their Petition, that the trial court had granted them the right to rebut certain evidence put in by Phillips and described in the Court Opinion as set out in the footnote below.[3] With respect thereto, the Court of Appeals found:

> "We are unable to perceive the need to rebut this evidence. We are not told how it could be rebutted, nor how it was in anyway prejudicial. We find no prejudice to plaintiffs in these events." (Opn. App. 5a).

As in the Court of Appeals, petitioners completely fail in their Petition to show the need to rebut the evidence referred to, how it could be rebutted or how it was prejudicial to petitioners.

Petitioners insisted in the Court of Appeals that Rule 50(a) prohibits the granting of a motion for instructed verdict during the presentation of the defendants' case. The Court of Appeals points out that the rule itself contains no such prohibition, and that the Court of Appeals could find no case suggesting such a prohibition (Opn. App. 6a). Petitioners cite us to none.

As pointed out by the Court of Appeals (Opn. App. 6a), the question of directing a verdict for a defendant during defendant's presentation is one of orderly procedure in the frame of reference of trial court discretion, procedural due process, and a fair trial. With respect thereto, the Court of Appeals concluded:

> "Here there is nothing of record to support any denigration of procedural due process or the essence of a fair trial. Thus we find no error as claimed." (Opn. App. 6a).

In support of the trial court's authority to instruct a verdict, the court cited *Merchants National Bank of Boston v. The State National Bank of Boston* (1871), 77 U.S. 604, wherein the

[3] "They now contend that the court granted them the right to rebut evidence put in by Phillips in two instances. This evidence, produced from the files of Shell Oil Company, consisted of commitments to Cameron from oil producers to sell crude oil for transportation by Panotex. The pipeline of Panotex connected with that of Shell and all Cameron sales were to Shell. The other evidence was the record of oil deliveries from Cameron to Shell via Panotex." (Opn. App. 5a).

court stated it was the practice to give the instruction for a directed verdict if it were clear that the plaintiff could not recover and that it would be idle to proceed further when such must be the inevitable result (Opn. App. 6a). Many other cases by this Court, some citing *Merchants National Bank of Boston v. The State National Bank of Boston*, are to the same effect.[4]

The fact that petitioners received due process and a fair trial within the framework and teachings of this Court in the cases just cited is demonstrated by the trial court's conclusion, affirmed and reiterated by the Court of Appeals, that after reviewing the evidence in the light most favorable to plaintiffs and indulging in plaintiffs' favor all inferences reasonably drawn from established facts, directed verdicts should be given for the defendants since reasonable men could not differ as to the result.

The careful analysis of the record by the Court of Appeals, evidenced by its opinion, its complete findings of fact and the inevitable conclusions drawn by it from such facts, further demonstrate that the plaintiffs received due process and a fair trial and demonstrate that the facts present nothing more than a case of legitimate competition rather than proscribed activities resulting in illegal competition, or conduct that was illegal per se.

Petitioners seemingly draw the conclusion that the Court of Appeals reached its decision by ignoring plaintiffs' evidence and relying on the evidence of the defendants. The opinion below makes it clear that such assertion by petitioners is ill founded.

[4] The Board of County Commissioners of the County of Marion v. Clark (1877), 94 U.S. 278; Edwards v. Kearzey (1878), 96 U.S. 572; County of Macon v. Shores (1877), 97 U.S. 276; Oscanyan v. Winchester Repeating Arms Company (1881), 103 U.S. 261; Baltimore & Ohio Railroad Co. v. Groeger (1925), 266 U.S. 521, 524, and the multitude of Supreme Court cases there cited to the effect that it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different ruling; Brady v. Southern Railway Company (1943), 320 U.S. 476, 479-480, and the cases there cited.

From the opinion of the Court of Appeals it appears that in the trial court there was no actual controversy on any material fact. There was either no evidence to support a particular claim of plaintiffs or the established indisputable evidence, supplied by both plaintiffs and defendants, was so clear and uncontrovertible that support for plaintiffs' claims could not be found either in such evidence or in any reasonable inference to be drawn therefrom.

By citing Professor Wright's LAW OF FEDERAL COURTS, one of the Hornbook Series of law school publications of West Publishing Company, petitioners seek to present a conflict between decisions as to whether all of the evidence presented to the time of the directed verdict or only the evidence favorable to the non moving party, should be considered in determining whether a directed verdict should be granted. Professor Wright acknowledges that the rule that all the evidence should be considered was established by this Court in *Pennsylvania R.R.Co. v. Chamberlain* (1933), 288 U.S. 333, and *Southern Railway Company v. Walters* (1931), 284 U.S. 190, but speculates that this Court has "apparently adopted a different rule, though without expressly rejecting the older cases."[5] The only decisions cited by Professor Wright as supporting a different rule are, however, *FELA* and *Jones Act* cases and any rules stated therein should be limited to *FELA* and *Jones Act* cases because of their special statutory nature.

This respondent submits that if it is ever necessary to resolve any so-called "conflict", such issue is not presented in this case because petitioners are not entitled to recover under their philosophy of this case or under their view of the applicable law. The Court of Appeals, said in such regard:

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[5] C. Wright, Law of Federal Courts 426 (2d ed. 1970).

> "It seems implicit in plaintiffs' position that they view the law as protecting them from competition, whether from those already in the market or from newcomers to the market. This is not the law, and the fact that a pipeline can be a natural monopoly does not mean that it is protected from competition." (Opn. App. 23a).

This Court, in *Brady v. Southern Railway Company* (1943) 320 U.S. 476, adopted the "reasonable man" test in passing on the sufficiency of the evidence to support a directed verdict as follows:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

Both the trial court and the Court of Appeals applied such test in this case and after viewing the evidence in the light most favorable to plaintiffs and giving them the benefit of all inferences which might be reasonably drawn from established facts concluded there was no antitrust violations and the record was "one of allowable competition — nothing more."

This case because of its peculiar fact situation does not present questions of great public interest requiring this Court to grant certiorari to review the evidence and inferences drawn therefrom and to discuss specific facts as petitioners seek by their Petition.

II.

NO CONFLICT EXISTS BETWEEN THE DECISION HEREIN AND OTHER CIRCUIT COURTS CONCERNING THE NEED TO PROVE "DANGEROUS PROBABILITY OF SUCCESS" IN ATTEMPT TO MONOPOLIZE CASES WHERE, AS HERE, THE COURT FOUND NO EVIDENCE OF ILLEGAL INTENT TO MONOPOLIZE

Petitioners ignore the fact that it was not necessary for the Court of Appeals to determine whether there was a "dangerous probability of success" in the claimed "attempt to monopolize" cases separately asserted against Shamrock and Phillips, by petitioners. Such determination was unnecessary because the Court of Appeals found there was no evidence of an illegal intent to monopolize on the part of either Phillips or Shamrock. Since "intent" to monopolize is essential in an "attempt to monopolize" case,[6] it becomes immaterial whether there was a "dangerous probability of success" because the "intent" was absent.

As to Shamrock, the Court of Appeals, in finding no intent to monopolize, stated:

> "By and large, as stated, Shamrock was in this area prior to the entry of Panotex and, like Phillips, was seeking oil for its refinery. There is no evidence that the conduct of Shamrock or its subsidiary exceeded a protective position. It competed with Panotex for oil but without predatory action. It engaged in no conduct which can be described as illegal per se under the Sherman Act." (Opn. App. 21a).

As to Phillips and Phillips Pipeline, the Court found the evidence to show nothing more than "a proper business motive under the circumstances" and that something more must be proven "to show an intent to monopolize." (Opn. App. 18a).

[6] American Tobacco Company v. United States (1946), 328 U.S. 781; Swift & Co. v. United States (1905), 196 U.S. 375, 396; and Times-Picayune Publishing Company v. United States (1953), 345 U.S. 594, 626. See also, Lessig v. Tidewater Oil Company (9th Cir. 1964), 327 F. 2d 459, cert. den. 377 U.S. 993, the only case cited by petitioners as dispensing with proof of "dangerous probability of success" in an attempt to monopolize case wherein the court's holding was clearly predicated on proof of "specific intent" to monopolize.

Regarding both defendants, the Court said:

> "Under the test of viewing the evidence in the light most favorable to plaintiffs and giving them the benefit of all inferences which might reasonably be drawn from established facts, we have nothing more than competition between the parties." (Opn. App. 22a, 23a).

The Court of Appeals concluded:

> "However, after having considered all of the evidence and every contention made by plaintiffs, we find no evidence of an illegal restraint or of a proscribed attempt to monopolize on the part of defendants, individually or collectively. The record is one of allowable competition — nothing more." (Opn. App. 23a).

In addition to these findings of no illegal intent to monopolize the Court of Appeals found:

As to Shamrock,

> "The proof is clear that there was no dangerous probability of a monopoly." (Opn. App. 21a)

and as to Phillips,

> "Assuming *arguendo*, intent and a relevant market, a dangerous probability of success is clearly lacking." (Opn. App. 18a, 19a).

Such last quoted findings are additional reasons why no attempt to monopolize was proven if "dangerous probability" must be proved to establish "attempt to monopolize", and are merely surplusage where "dangerous probability" is not necessary to be proved because no illegal intent to monopolize was established.

The only case cited by petitioners which holds that it is not necessary to establish a dangerous probability of success in an "attempt to monopolize" case was one where there was evidence

of *specific intent* to monopolize. *Lessig v. Tidewater Oil Company,* (9th Cir. 1964), 327 F. 2d 459, cert. den. 377 U.S. 993.

The only other case cited by petitioners, *United States v. Consolidated Launderies Corporation,* (2nd Cir. 1961), 291 F. 2d 563, 573, as raising a conflict with the present case was a "conspiracy to monopolize" case, and the decision there that "dangerous probability" was not an element to be proved, was clearly limited to a situation where evidence of a conspiracy with *specific intent* to monopolize was present. Thus the issue of whether "dangerous probability of success" is required to be proved in an "attempt to monopolize" case is not presented here.

The Court of Appeals, after viewing the evidence in a light most favorable to petitioners, found, as to the respondents, that the evidence showed no more than a motive to protect their position in the market area, and that the evidence failed to reflect any predatory act or illegal act in pursuance of this motive (Opn. App. 18a, 19a, 21a, 22a, 23a).

The holding of the Court of Appeals that there was "no dangerous probability of success" as to each of the defendants rather than raising an issue of a conflict of decisions with other courts, strengthens the conclusion that no evidence of specific intent to monopolize was present. See *Lessig v. Tidewater Oil Company, supra,* at page 474, where the court, referring to dangerous probability of success, said:

> "Of course, such a probability may be relevant circumstantial evidence of intent * * *."

Under the circumstances here presented and the specific finding of no intent to monopolize, there is, in fact, no conflict be-

tween the opinion of the Court of Appeals herein and other Courts of Appeal.

Petitioners' claim of conflict between the opinion herein and other Courts of Appeal on "dangerous probability" is ill-founded and does not present a reason for granting certiorari herein.

III.

THE DECISIONS BELOW DID NOT RAISE AN ISSUE REGARDING INTERCORPORATE CONSPIRACIES

Petitioners' in their third question assert claims of conspiracy between respondent Shamrock and its subsidiary, Shamrock Pipe Line Corporation, and between Phillips and its subsidiary, Phillips Pine Line Company. These claims are predicated on the assumption that the subsidiaries' pipeline extensions were uneconomic. The Court of Appeals, however, found that there was no evidence that any pipelines were uneconomic. Thus petitioners' third ground for certiorari is without merit because it assumes a fact situation (uneconomic extension of gathering lines by the subsidiary pipeline companies) found not to exist, by the Court of Appeals.

With regard to Phillips, the court said:

> "There is no proof, however, that the extension was unprofitable and thus something from which an inference of predatory conduct could be drawn" (Opn. App. 18a).

With regard to Shamrock, which is referred to under petitioners' Ground III only in a footnote, the record is likewise devoid of evidence that its pipeline extensions were uneconomic. Rather, it is apparent from the evidence that the extensions were

made in the normal course of business. As stated by the Court of Appeals:

> "There is no evidence that Shamrock conspired with its pipeline to restrain trade or to monopolize. The competing lines were simply built either prior to the entry of Panotex or after the entry of Panotex." (Opn. App. 20a).

Petitioners do not point to any evidence showing Shamrock's pipeline was uneconomic but would have this court hold that a parent corporation and its wholly-owned subsidiary corporation cannot "agree" to do the very acts that they have been organized to do, though the acts are lawful and in pursuance of a lawful motive.

The Court of Appeals, after reviewing the voluminous record could find "* * * no evidence that the conduct of Shamrock or its subsidiary exceeded a protective position." (Opn. App. 21a). Instead, the Court found that the evidence showed with regard to Shamrock:

> "It competed with Panotex for oil but without predatory action. It engaged in no conduct which can be described as illegal per se under the Sherman Act." (Opn. App. 21a).

Thus the record does not raise the question presented, rather, petitioners are again seeking a third review of the evidence where two lower courts have both failed to find support for their claims after such reviews.

Hence it is submited petitioners' Ground III does not present any reason or ground for this court granting certiorari.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1335

PANOTEX PIPE LINE COMPANY, ET AL,
Plaintiffs-Appellants,

versus

PHILLIPS PETROLEUM COMPANY and
DIAMOND SHAMROCK CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

(February 17, 1972)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

BELL, Circuit Judge: This appeal arises out of antitrust litigation. The district court directed verdicts for the defendants. We affirm.

Cameron and its pipeline subsidiary, Panotex, claimed damages jointly and severally against Phillips

and Shamrock, alleging a conspiracy between them, and also a conspiracy between each of them and their respective subsidiaries, Phillips Pipe Line Company and Shamrock Pipe Line Corporation. The gist of the complaint was a conspiracy, as stated, to restrain and monopolize, and to attempt to monopolize interstate commerce in the purchase and transportation of crude oil in designated areas in violation of §§ 1 and 2 of the Sherman Act. 15 USCA, §§ 1 and 2. The cause of action also alleged individual conduct on the part of Phillips and Shamrock in violation of the same statutes. The prayer was for damages and injunctive relief under §§ 4 and 16 of the Clayton Act. 15 USCA, §§ 15 and 26. The complaint and the evidence introduced in support thereof bottoms out as a claim that defendants attempted to foreclose a competitor, and having failed in that, to thereafter restrict the competitor.

The cause was tried to a jury. Motions for directed verdicts filed by Phillips and Shamrock were denied by the district court at the close of plaintiffs' case. Defendant Phillips then proceeded to put on its defense. Shamrock put in a part of its evidence through cross-examination of witnesses for Phillips. After two days of defense evidence, the court suggested, sua sponte, that Shamrock again move for a directed verdict. Shamrock so moved and the motion was granted. Phillips then asked for the same relief and its motion was granted. Counterclaims against Cameron and Panotex were severed and are not a part of this appeal.

There are three assignments of error. First, plaintiffs urge that it was prejudicial procedural error to

grant motions for directed verdicts in the middle of defendants' cases, i.e., at a random time during the trial. The contention is that a directed verdict may be granted under Rule 50, F.R.Civ.P., only after the opening statement of opposing counsel, at the close of the evidence offered by an opponent, or at the close of all of the evidence, citing 5A Moore's Federal Practice, par. 50.04. Plaintiffs also assign error on a substantive basis in the granting of directed verdicts, urging that the evidence was sufficient to make a jury question. Lastly, error is asserted on the basis of the exclusion of certain items of evidence offered by plaintiffs.

The facts will be detailed in connection with the discussion of the alleged substantive error in directing verdicts for defendants. We proceed first to a discussion of the claimed procedural error.

I.

The motions for directed verdict were granted during the presentation of the defense testimony. There was extensive colloquy between the court and counsel. The posture of the case at the time was somewhat complex in that the counterclaims of each defendant based on alleged antitrust violations by plaintiffs were being tried to the same jury. Plaintiffs' proof was voluminous and the court indicated that it had reviewed all of the testimony to date and was inclined to reconsider the motion of Shamrock for a directed verdict, and also to sever Shamrock's counterclaim. (This was the previously overruled motion for directed verdict.)

The court then ruled as indicated for Shamrock. At that point, plaintiffs joined with Phillips in moving for a mistrial because of the hiatus and confusion left in the proof as to liability and damages due to the removal of Shamrock. Phillips had moved for a directed verdict following the grant of Shamrock's motion but this motion was overruled. Following the joint motion for mistrial, the court reconsidered and granted Phillips' motion for directed verdict and also severed its counterclaim.

At no time during the proceeding did plaintiffs offer any objection whatever to the timing of the directed verdicts. Moreover, nothing was said during the proceeding which pointed to any prejudice to plaintiffs from the standpoint of timing.

There was a hearing on the form of the final judgment about a month later. At this hearing, plaintiffs took the position for the first time that they were prejudiced by the timing of the grant of the motions in that they had previously reserved the right to redirect examination of certain witnesses. The record does not reflect this reservation. The court, in fact, required plaintiffs to complete their case prior to closing.

At the same hearing, plaintiffs urged the court to make it clear in the final judgment that the motions for directed verdicts were granted on the state of the record at the time the motions were granted. The court and all counsel agreed that this was the case and the judgment so provides. Having this in mind, plaintiffs take a different position here with respect to prejudice.

They no longer urge the reservation of the right to redirect examination of the witnesses. They now contend that the court granted them the right to rebut evidence put in by Phillips in two instances. This evidence, produced from the files of Shell Oil Company, consisted of commitments to Cameron from oil producers to sell crude oil for transportation by Panotex. The pipeline of Panotex connected with that of Shell and all Cameron sales were to Shell. The other evidence was the record of oil deliveries from Cameron to Shell via Panotex. We are unable to perceive the need to rebut this evidence. We are not told how it could be rebutted, nor how it was in anyway prejudicial. We find no prejudice to plaintiffs in these events.

We do not reach the question whether Rule 50, F.R. Civ. P.,[1] prohibits the granting of a motion for directed

---

[1]Rule 50:

"(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

"(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. . . ."

verdict during the presentation of a defendant's case. The rule contains no such restriction nor have we found any authority supporting such a restriction. Indeed, we have found no case in point one way or the other. The Supreme Court long ago pointed to the salutary purpose of a motion for directed verdict. In *Merchants' National Bank of Boston v. The State National Bank of Boston*, 1871, 77 U.S. 604, 19 L.Ed. 1008, it was said with reference thereto:

> "According to the settled practice in the courts of the United States, it was proper to give the instruction if it were clear the plaintiff could not recover. It would have been idle to proceed further when such must be the inevitable result. The practice is a wise one. It saves time and costs; it gives the certainty of applied science to the results of judicial investigation; it draws clearly the line which separates the provinces of the judge and the jury, and fixes where it belongs the responsibility which should be assumed by the court." 77 U.S. at 637

In the end, the question of directing a verdict for a defendant during the defendant's presentation is one of orderly procedure in the frame of reference of trial court discretion, procedural due process, and a fair trial. Here there is nothing of record to support any denigration of procedural due process or the essence of a fair trial. Thus we find no error as claimed.

From the view that plaintiffs must show prejudice, the situation is analogous to federal criminal procedure where the court commits error by reserving a ruling on a defendant's motion to acquit. The error is harmless absent a showing that the evidence was insufficient to sustain a conviction when the government rested its case. *Cooper v. United States*, 5 Cir., 1963, 321 F.2d 274, 277; *Montoya v. United States*, 5 Cir., 1968, 402 F.2d 847, 849-50; *United States v. Day*, 5 Cir., 1971, 438 F.2d 121, 122.

As Justice Field stated for the court in *Oscanyan v. Winchester Repeating Arms Company*, 1881, 103 U.S. 261, 26 L.Ed. 539, in a case where a verdict was directed following the opening statement of counsel:

> "... if in the progress of a trial, either by such admission [of counsel] or proof, a fact is developed which must necessarily put an end to the action, the court may, upon its own motion or that of counsel, act upon it and close the case." 103 U.S. at 263

II.

Before considering the merits of the action of the district court in granting the motions for directed verdict, it will be necessary to resolve the question presented with respect to the exclusion of certain evidence offered by plaintiffs. This question involves three separate items.

The first item is an inter-corporate letter from one Phillips employee to another, dated November 11, 1960, setting out the general situation in the industry as to oil reserves in the general geographical area pertinent to this suit. The letter mentions the prospect of raiding Shamrock's customers to increase Phillips' crude oil supply. The crude oil reserves and acquisition prospects of many oil companies in the area are also discussed. The position of plaintiffs is that this letter was admissible to show motive for later concerted action between Phillips and Shamrock. The district court excluded it on the ground that it originated prior to the period of activities giving rise to the suit.

We hold that this letter was admissible, and was to be given such weight as it might deserve in light of the proof, if any, as to any future concerted action between Phillips and Shamrock. Cf. *Federal Trade Commission v. Cement Institute*, 1948, 333 U.S. 683, 705, 68 S.Ct. 793, 92 L.Ed. 1010. Accordingly, it will be considered here in determining whether verdicts should have been directed.

The next item was a contract showing that Shamrock purchased casinghead gas from oil producers. Plaintiffs, not having a refinery, purchased only crude oil and condensate. The argument is that Shamrock used casinghead gas purchases as a lever to obtain contracts for the purchase of crude oil and condensate; hence, an illegal tying arrangement. The district court excluded this evidence on the ground that it was irrelevant to the pleadings.

Ordinarily this evidence would have been admissible to show the vehicle for an illegal tying arrangement as a part of an attempt to monopolize or restrain trade on the part of Shamrock. The admission would be subject, however, to the introduction of some evidence of a tying arrangment. There was no proffer of evidence to show such a tying arrangement at the time this evidence was excluded nor at any other time. Thus the error was in the abstract and harmless.

The third item of evidence is a group of letters and memoranda having to do with the effort of Cameron to obtain a loan from the First National City Bank of Houston, Texas, with which to finance their proposed pipeline. The fact of attempting to obtain this loan was stipulated. There was also full testimony regarding the effort. Plaintiffs wished to put in such portions of the letters and memoranda as would reflect Phillips' alleged antagonism to the proposed pipeline and as would provide a basis for an inference that the loan was not made because of Phillips' influence over the bank. The district court excluded this evidence on grounds that the documents contained hearsay, as well as self serving opinions and conclusions on the part of a Cameron agent. With these objectionable portions removed from the documents, the court was of the opinion that nothing of coherent value would remain to be considered by the jury.

This evidence consisted of twelve letters and three memoranda prepared by Cameron's agent and one letter from an officer of the Houston bank regarding Cameron's application for the loan. The court properly

refused to admit the conclusions and opinions of Cameron's agent which were contained in the letters and memoranda. They were not admissible under the Business Records Act, 28 USCA, § 1732(a); *Standard Oil Company of California v. Moore*, 9 Cir., 1957, 251 F.2d 188, 213-14. No effort was made by plaintiffs to introduce the documents with the conclusions and opinions deleted and thus we need not consider whether the remaining documents or parts thereof qualified as an exception to the hearsay rule under the Business Records Act. The court did not err in excluding this evidence.

There is one other item of excluded evidence concerning which plaintiffs assign error but it goes to the question of damages. As will be seen, we do not reach the question of damages and thus it is unnecessary to consider this assignment of error.

III.

We now turn to question whether the court erred in directing verdicts for defendants or either of them. The test to be applied is the now familiar one of *Boeing Company v. Shipman*, 5 Cir., 1969, 411 F.2d 365 (en banc), where we said:

> "On motions for directed verdict ... the Court should consider all of the evidence — not just that evidence which supports the non-mover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and infer-

ences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury." 411 F.2d at 374.

Phillips and Shamrock were integrated oil companies in that they owned and operated refineries in the geographical area with which we are concerned. They transported their own production as well as the production of others to their refineries. The transportation was by their subsidiary pipeline companies. Cameron had no production but purchased from others for transportation over Panotex, its subsidiary, to Shell's pipeline.

It is a fact also that a pipeline tends to be a natural monopoly. Plaintiffs offered testimony to the effect that the first pipeline into an area customarily gets the connections that are available in the oil fields. If two lines enter at about the same time, they are likely to divide the available production. In addition, a trucking operation is not competitive with a pipeline.

As the Supreme Court has noted, *Federal Trade Commission v. Cement Institute*, supra; *Standard Oil Co. v. United States*, 1911, 221 U.S. 1, 46, 31 S.Ct. 502,

55 L.Ed. 619, evidence as to events prior to and following alleged antitrust activity is admissible if it tends to show the purpose and character of particular transactions under investigation. Thus it is that the charges against defendants must be viewed in the background of the facts as they existed prior to entry of Cameron and Panotex into the pipeline market; indeed prior to the creation and construction of Panotex.

Background and Relevant Markets

The controversy involves competition between three pipelines, Phillips, Shamrock and Panotex, in the general area of the Texas-Oklahoma border. Oil situated in two counties in Oklahoma is involved: Beaver and Texas Counties. These counties border on the north boundary of the State of Texas. Oil situated in ten Texas counties lying immediately south of these Oklahoma counties is also involved. The counties are Hansford, Ochiltree, Lipscomb, Moore, Hutchinson, Roberts, Hemphill, Carson, Gray and Wheeler.[2]

Phillips' refinery is in Hutchinson County. Shamrock's refinery is in Moore County. As of 1954, the crude oil for these refineries was supplied out of the Texas panhandle oil field, in Moore, Hutchinson, Roberts, Carson, Gray and Wheeler Counties. The reserves in this field were becoming inadequate to meet the needs of the refineries. New fields were being developed in the counties to the north and east. By 1957, Shamrock

[2]See Appendix A attached for a map of the general area and the pipelines pertinent to this litigation.

had extended its pipeline north into fields located in Hansford and Ochiltree Counties. Phillips remained in the panhandle.[3]

By 1961, Phillips had extended its pipeline through the southeast corner of Hansford County to connect one field, and on through Ochiltree County to connect with several fields and into Texas and Beaver Counties in Oklahoma (the Camrick area) to connect with fields there. Its pipeline crossed that of Shamrock in Ochiltree County.

In 1961, Cameron was engaged in purchasing crude oil in the Camrick area of Texas and Beaver Counties and transporting it by truck for resale. The Phillips pipeline extension into the Camrick area brought about a considerable reduction in Cameron's trucking business but that reduction is not a basis of the claim here.

In 1963, Mobil Oil, a company not involved in the controversy here, extended its pipeline into the Camrick area from the north.

The area to the east of these lines, in Texas and Oklahoma was undeveloped. Thereafter, beginning in 1963, fields were developed in this eastern area, in Beaver County, Oklahoma, and in Lipscomb County and in the north part of Hemphill County, in Texas.

By August 1963, Shamrock had extended its pipeline eastward into this new area in Lipscomb County to

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[3]By 1968, Shamrock had extended its line to southern Colorado to obtain oil for its refinery.

connect with the Frass and W. Follett fields. This was pre-Panotex.

During this year of 1963 the Panotex pipeline was conceived by Cameron and commitments from producers were being obtained. Primary equity financing was obtained in late 1963 from Alliance Business Investment Company. In February 1964 a loan was sought from the Houston bank. This effort was unsuccessful and financing was sought and obtained in New York in July 1964. Panotex came into corporate existence in July 1964, its line was commenced in October 1964 and became operative in January 1965.

Meanwhile, as Cameron's president discovered in 1963, Phillips was soliciting commitments from purchasers in 1962 in the Oklahoma part of the Texas-Oklahoma area where Cameron began solicitations in 1963. These solicitations were for production as far east as the Logan area in Beaver County, Oklahoma. Phillips had considerable production of its own in the Como area and was trucking six to seven thousand barrels of oil per day from there to Camrick. This oil amounted to approximately ten per cent of the capacity of Phillips' refinery.

Cameron testified that he began looking at this area after his Camrick trucking operation declined in 1961. His idea was that new pools of oil would be developed in this eastward territory in Beaver and Lipscomb Counties and this proved to be the case in the next few years.

This brings us to the relevant markets. Plaintiffs tried the case on the theory of three relevant markets. We will consider the case on that basis and without determining the correctness of the delineation.

Area I, according to plaintiffs' theory of suit, is the Camrick area, heretofore described. It was served by Phillips' pipeline beginning in 1961 and by Mobil beginning in 1963. Panotex has never entered this market.

Area II is south Beaver County and mainly the Balko, Elmwood and Como fields in that county. Phillips extended its pipeline east through the Balko and Elmwood fields and to Como in September 1964. Panotex constructed its line westward through these fields in January 1965. Prior to these extensions, Cameron and Phillips were advised of what the other proposed to do.

Shamrock served neither Area I or II by pipeline. Phillips does not serve Area III. Area III consists of the Logan field in Beaver County, Oklahoma and all of Lipscomb County, and the Feldman field in Hemphill County, Texas. It is served by Shamrock and Panotex. The Panotex line began at the Shell pipeline at Elk City in Beckham County, Oklahoma, considerably southeast of the areas in question, and thence extended in a northwesterly direction into fields in Lipscomb and Hemphill Counties, Texas, namely the Feldman, West Higgins, Kelln and Mathers field. It is to be noted that Panotex had a monopoly in these fields until 1968 when Shamrock entered Kelln and West Higgins. The Cranford, Bishop and West Durham fields had

been developed along the line of Panotex by 1968 and were served exclusively by Panotex.

The line of Panotex continued northwesterly to reach the Lipscomb and Bechthold fields in Lipscomb County, Texas, and the Loan field in Beaver County, Oklahoma. It appears that Shamrock reached the Lipscomb field in August 1963 and extended to the Logan and Bechthold fields in August 1964. Shamrock, prior to its extension and the entry of Panotex, had been purchasing oil from the Logan area from a trucker who served the area.

The Case Against Phillips and its Subsidiary

The issue presented is the foreclosing or restriction of a competitor, Cameron-Panotex. The claim is premised on conduct of Phillips, acting alone or in league with its pipeline subsidiary or with Shamrock.

We begin by eliminating Area I. Panotex is not in Area I. Phillips has been there since 1961. Cameron-Panotex makes no case whatever from a factual standpoint on being foreclosed from or restrained in Area I, either through an attempted monopoly or by way of a restraint. The facts at best show only that Area I had no pipeline service until 1961 when Phillips entered. There is no evidence that Cameron-Panotex ever considered entering Area I after the entry of Phillips. The evidence demonstrates no more than a normal business venture on the part of Phillips in entering Area I (Camrick). The issue narrows to Areas II and III.

Area II consists of only three fields, Balko, Elmwood and Como. They are served by Phillips and Cameron-Panotex. Phillips extended east from Area I in September 1964 and Panotex commenced service in January 1965. Phillips had solicited commitments in Area II in 1962 according to Cameron. It was trucking oil out of the area and had production of its own on 16,000 acres of leases in the Como area. Phillips also solicited in the Logan field in Area III. Cameron began solicitations in the area in 1963. There was no previous pipeline service to Area II. Phillips had little success in obtaining commitments.

The evidence disclosed that plaintiffs were purchasing 100 per cent of the Balko production, most of the Elmwood production, fifty per cent of the Como production (Phillips had some production), and all of the Logan production except for one producer. This was the situation immediately upon the completion of the Panotex line and plaintiffs obtained all of the oil that was committed to them. In the ensuing years, Panotex has obtained all new production in Area II and at Logan. Phillips has not connected to a new lease since 1964.

When Cameron announced in 1964 that it had received financing, Phillips met Cameron's price and contract terms. Its prior offers had been higher and its contract terms more stringent. In addition, Phillips agreed with its pipeline subsidiary to guarantee it a seven per cent return on investment as a condition of a pipeline extension into Area II. The commitments of Phillips, according to plaintiffs, were insufficient

to produce such a return. It does appear that the commitments were less than the number theretofore insisted upon by the Phillips pipeline subsidiary. There is no proof, however, that the extension was unprofitable and thus something from which an inference of predatory conduct could be drawn. In meeting the Panotex competition, Phillips took three simultaneous steps: (1) it met Cameron's price offer; (2) it met Cameron's contract requirements as to period of contract; (3) it guaranteed its pipeline subsidiary a seven per cent return so as to replace its trucking operation with a pipeline. The proof stops here. It goes no further than to show that Phillips needed the oil for its refinery and would be preempted by the entry and consequent monopoly of another pipeline. It is true that the evidence shows that Phillips considered Area II as "its own backyard" and sought to protect its position in the area. This, however, amounts to nothing more than a proper business motive under the circumstances. Cf. *Times-Picayune Publishing Company v. United States*, 1953, 345 U.S. 594, 627, 73 S.Ct. 872, 97 L.Ed. 1277, on the necessity to prove something more than a "step predominantly motivated by legitimate business aims ..." to show an intent to monopolize.

At this point we find that the evidence of a conspiracy between Phillips and its pipeline subsidiary is nonexistent from the point of showing a violation of §§ 1 or 2 of the Sherman Act.

This is likewise true as to showing an attempt to monopolize on the part of Phillips. Assuming *arguendo*, intent and a relevant market, a dangerous probability

of success is clearly lacking. See *Cliff Food Stores, Inc. v. Kroger, Inc.*, 5 Cir., 1969, 417 F.2d 203, 206-08.

The action of Phillips in extending into Area II did not rise above a protective motive. Phillips was already present through a trucking operation and through its own production. Panotex was transporting in another direction and away from Phillips' refinery. Protection of its refinery by the assurance of some of the oil reserves in Area II was no more than a normal business practice absent conduct calculated to bar the entry of a competitor into Area II or to drive a competitor out of the area. The proof disclosed no such conduct on the part of Phillips. There was no proof of predatory conduct or of conduct which was illegal per se. It follows that the proof was insufficient to make a jury question as to a restraint of trade by Phillips from the conduct disclosed to this point.

Plaintiffs urge that Phillips violated the Sherman Act by allegedly blocking Cameron's application for a loan from the Houston bank with which to construct Panotex. The Chairman of Phillips happened to be a director of the bank. Phillips had been a long time large depositor in the bank. The other side of the coin is that the loan was never formally rejected although some five months of negotiations took place. The bank was troubled by the probability of success of the venture, considering competitive pipelines in the proposed Panotex area and the status of Cameron's commitments. There is no evidence that Phillips influenced by word or deed the decision not to make the loan. There the matter ends. A Phillips officer on the bank

board and a Phillips deposit in the bank will not suffice as a base for an inference of loan influence and in turn, for an inference of an antitrust violation. The bank sent a consultant to discuss the prospects of Panotex with Phillips and Phillips advised that it intended to compete for the oil. This was a business judgment in line with the needs of its refinery. Phillips was not willing to give up the area where it competed to Panotex.

There is one other charge against Phillips and it stems from an alleged division of markets as between Shamrock and Phillips. This will be considered following the discussion of the case against Shamrock.

The Case Against Shamrock and Its Subsidiary

There is no evidence that Shamrock conspired with its pipeline to restrain trade or to monopolize. The competing lines were simply built either prior to the entry of Panotex or after the entry of Panotex. The subsidiary pipeline did no more than build lines, set prices and make purchases. Shamrock's prices were uniform throughout the Shamrock system except in one instance. This one instance occurred for a short time in the Logan and Bechthold fields. Shamrock first attempted to pay producers a price less than that paid by Cameron. When Cameron obtained commitments from eighty per cent of the producers, Shamrock raised its net offer to the producers. After this price increase, Shamrock's price, while exceeding that of Cameron by two cents per barrel, was uniform with its prices throughout the remainder of its system.

Moreover, Cameron had contracts with its producers to hold them providing it met the prices of others.

The competition between Panotex and Shamrock was all in Area III. By and large, as stated, Shamrock was in this area prior to the entry of Panotex and, like Phillips, was seeking oil for its refinery. There is no evidence that the conduct of Shamrock or its subsidiary exceeded a protective position. It competed with Panotex for oil but without predatory action. It engaged in no conduct which can be described as illegal per se under the Sherman Act. The proof is clear that there was no dangerous probability of a monopoly.

We conclude that the evidence was insufficient to make jury issues on the charges against Shamrock to this point.

The Alleged Phillips-Shamrock Conspiracy

The proof was that Phillips and Shamrock had been competing in the general area involved for more than 40 years. There was evidence as to specific examples of competition between them. Plaintiffs' case, however, comes down to evidence of a elephone conversation between Phillips and Shamrock, made to Phillips by Shamrock in 1964, wherein Shamrock inquired whether Phillips had any interest in extending into the Logan area. Phillips answered that it did. Shamrock replied that it too would also have to go into Logan and that "it won't be the first time we have been competitors."

Plaintiffs make much of the fact that Shamrock extended to Logan and Phillips did not. Phillips went no further east than the Como field in Area II while Shamrock went no further west than Logan. Standing alone, this might give rise to an inference of a division of markets between Phillips and Shamrock to the detriment of their mutual competitor, Panotex. But this evidence does not stand alone.

Phillips had been seeking commitments in the Logan area without success. Panotex had every producer in the field except one. Shamrock acquired that one. The interest of Phillips was such that it staked a right of way into Logan but abandoned the prospect for lack of business.

Phillips had production of its own in the Como field and some additional suppliers. These facts gave good reason for Phillips to stop at Como and for Shamrock to stop at Logan. They established a basis for a business judgment resting on the idea that a certain amount of production was necessary to warrant the expense of extending the pipelines. Any inference of a division of markets must give way to these facts.

This case began in 1964. It has been strenuously developed through discovery and otherwise. It occupied more than two weeks of trial time. In the end there is no substance to plaintiffs' claims. Under the test of viewing the evidence in the light most favorable to plaintiffs and giving them the benefit of all inferences which might reasonably be drawn from estab-

lished facts, we have nothing more than competition between the parties.

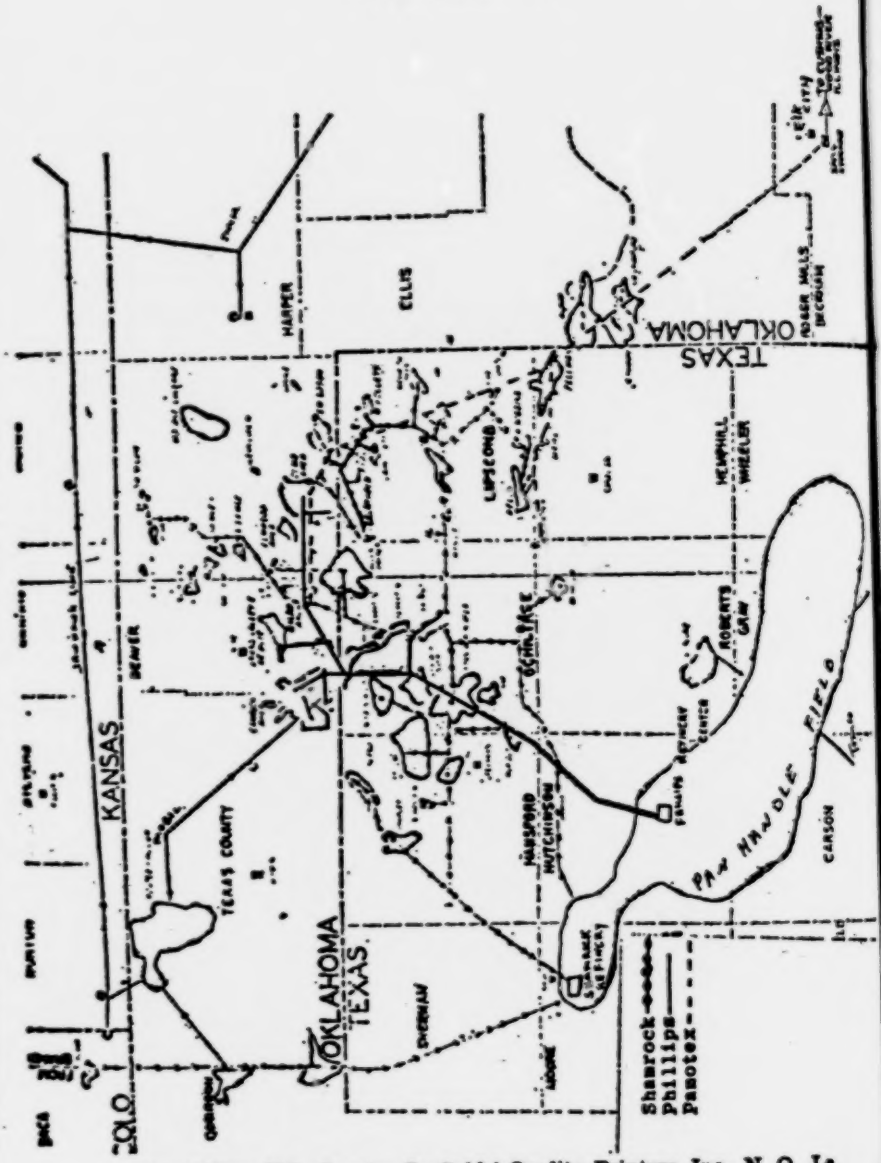
It seems implicit in plaintiffs' position that they view the law as protecting them from competition, whether from those already in the market or from newcomers to the market. This is not the law, and the fact that a pipeline can be a natural monopoly does not mean that it is protected from competition. The Sherman Act fosters competition by protecting it from illegal restraints and monopoly power. *Northern Pacific Railway Company v. United States*, 1958, 356 U.S. 1, 4-5, 78 S.Ct. 514, 2 L.Ed. 2d 545. Plaintiffs, of course, are protected to this extent. However, after having considered all of the evidence and every contention made by plaintiffs, we find no evidence of an illegal restraint or of a proscribed attempt to monopolize on the part of defendants, individually or collectively. The record is one of allowable competition — nothing more.

We hold that the district court did not err in directing verdicts for Phillips and Shamrock.

AFFIRMED.

PANOTEX v. PHILLIPS PETROLEUM CO.

APPENDIX "A"



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In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1504

PANOTEX PIPE LINE COMPANY and
CAMERON CRUDE OIL CORPORATION,
Petitioners,

v.

PHILLIPS PETROLEUM COMPANY and
DIAMOND SHAMROCK CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT PHILLIPS PETROLEUM COMPANY IN OPPOSITION

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In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1504

PANOTEX PIPE LINE COMPANY and
CAMERON CRUDE OIL CORPORATION,
Petitioners,

v.

PHILLIPS PETROLEUM COMPANY and
DIAMOND SHAMROCK CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT PHILLIPS PETROLEUM COMPANY IN OPPOSITION

This brief is submitted by Phillips Petroleum Company, one of the respondents herein, hereinafter called "Phillips".

OPINION BELOW

The opinion of the court of appeals is not yet reported, but is set forth in the Appendix to this brief. No written opinion was rendered by the trial court.

JURISDICTION

The date of the Judgment and Opinion sought to be reviewed by Panotex Pipe Line Company and Cameron Crude Oil Corporation is February 17, 1972. Petitioners seek to invoke the jurisdiction of this Court under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

Respondent does not agree that the questions presented are correctly stated in the petition. Although respondent will follow petitioners sequence of presentation to the extent possible, the only real question is whether both the trial court and lower court were wrong in finding no factual support for the alleged antitrust violations.

1. Did the entry of directed verdicts at a point in trial after petitioners rested require the reversal of the Judgment even though such action was not prejudicial? Was it proper for the court of appeals to consider at the request of petitioners all the evidence in the light most favorable to their case?

2. Should a review be granted for a hypothetical consideration of the dangerous probability requirement when there is no evidence or any reasonable inference in the record of an attempt to monopolize?

3. Should review be granted to consider if both the trial court and lower court were incorrect in their finding that there was no evidence of an antitrust violation?

STATEMENT OF THE CASE

Petitioners have failed to assert any valid reason why this court should grant certiorari. In an effort to make it appear that there was a fact issue for the jury to decide, the petitioners, Cameron Crude Oil Corporation and Panotex Pipe Line Company, assert as fact, matters which are without support in the evidence or any reasonable inference which could be drawn from the record. Both the trial court and the lower court determined, after a complete review of the record, that there was no evidence of an antitrust violation.

A complete review of the entire record by this Court would demonstrate that the lower court properly held that the trial court was correct in directing verdicts for the respondents, Phillips and Shamrock. Such a review of the record would also disclose numerous deficiencies and failures of proof in addition to those discussed by the lower court, which would also preclude any recovery by petitioners.

It seems clear that petitioners' real complaint is that they received competition when none was wanted. As was noted by the lower court:

> "It seems implicit in plaintiffs' position that they view the law as protecting them from competition, whether from those already in the market or from newcomers to the market. This is not the law, and the fact that a pipeline can be a natural monopoly does not mean that it is protected from competition. The Sherman Act fosters competition by protecting it from illegal restraints and monopoly power. *Northern Pacific Railway Company v. United States*, 1958, 356 U.S. 1, 4-5, 78 S. Ct. 514, 2 L. Ed. 2d 545. Plaintiffs,

> of course, are protected to this extent. However, after having considered all of the evidence and every contention made by plaintiffs, we find no evidence of an illegal restraint or of a proscribed attempt to monopolize on the part of defendants, individually or collectively. The record is one of allowable competition — nothing more." (Opn., App., p. 23a)

Even with the complained of competition from respondents, the Panotex line was not only constructed and is presently in operation, but also transports 75% of the production from the fields into which it was extended. The President of both Cameron and Panotex admitted at trial that Phillips had not caused a single oil producer to change his commitment from Cameron to Phillips (App., p. 227-232, 554), and that only one producer who had reserved the right to do so, changed his commitment from Cameron to Shamrock. (App., p. 230-232) Except for that one producer, Cameron obtained all of the oil in the Logan field, all of the oil in the Balko field, most of the oil in the Elmwood field, and one-half of the oil in the Como field. (App., p. 231-234) After completion of the Panotex line, Cameron obtained all of the new production from the fields into which both the Phillips pipeline and Panotex pipeline had extended.

The petitioners' allegations of conspiracy and attempted monopoly center around a part of the Texas and Oklahoma Panhandles and the Western Anadarko Basin which they have designated as "Areas I, II, and III", and contend constitute three separate "relevant markets". These three contiguous areas are found in Texas County, Oklahoma, Beaver County, Oklahoma, and Lipscomb County, Texas. They

are a short distance north of the Panhandle field where both the Phillips and Shamrock refineries are located. The Panhandle field which originally supplied the oil for these refineries has been declining in production for several years and has become unable to supply the Phillips refinery requirements. (Opn., App., p. 12a) Phillips looked to the Western Anadarko Basin which was viewed as the logical source of local crude oil to replace the declining production.

In 1961, Phillips made its first major pipeline extension outside the Panhandle field. This pipeline connected three fields in Ochiltree County, Texas, and terminated in the Camrick area field which is located in Texas County, Oklahoma, and Beaver County, Oklahoma. (Opn., App., p. 13a) When this suit was filed in 1964, the Camrick area field was what petitioners designated as "Area I".

Although Dan Cameron testified he had considered extending a pipeline into Camrick, this was not done when it was learned that Phillips planned to extend a pipeline into this area. As to "Area I" the lower court stated:

> "We begin by eliminating Area I. Panotex is not in Area I. Phillips has been there since 1961. Cameron-Panotex makes no case whatever from a factual standpoint on being foreclosed from or restrained in Area I, either through an attempted monopoly or by way of a restraint. The facts at best show only that Area I had no pipeline service until 1961 when Phillips entered. There is no evidence that Cameron-Panotex ever considered entering Area I after the entry of Phillips. The evidence demonstrates no more than a normal business venture on the part of Phillips in entering Area I (Camrick)." (Opn., App., p. 16a)

It is clear from the testimony of Dan Cameron that he abandoned the pipeline he had considered into the Camrick field when he learned that he would be in competition with Phillips. (App., p. 146, 527-528, 724, 729)

After the Phillips line was constructed into Camrick in 1961, truck reception points were established on the pipeline to receive oil that was trucked from developing fields to the east in Beaver County, Oklahoma, such as the Balko, Elmwood, and Como fields. Oil from these fields which was trucked to the Phillips Camrick line, and then transported to the Phillips refinery amounted to about 10% of the Phillips refinery capacity. (Opn., App., p. 14a) The Balko, Elmwood and Como fields are part of petitioners' "Area II".

Phillips had proposed the construction of an extension of its line from Camrick (Area I) to the Como (Area II) for several years, and proposals had been made to the producers. At the time Phillips made these offers to producers in 1962 and 1963, no other party was extending or had proposed to build a pipeline into the Como area. (App., p. 533-535) After Phillips' 1962 and 1963 offers to producers, competitors had appeared on the scene and had made proposals to build their own pipeline in the Como area. These included petitioners, Sunray DX Oil Company, and Derby Refinery Company.

In 1964, Phillips caused the extension of its existing pipeline which terminated in the Camrick field to the Elmwood and Como fields. It is apparently the petitioners' contention that after they announced the proposed construction of the Panotex line into "Area II and III" Phillips should not

have constructed its pipeline into "Area II". In fact, just before Phillips began its line into "Area II" this suit was filed on August 10, 1964, seeking to enjoin its construction. Aside from the fact that Phillips had been purchasing and transporting this production by truck for several years, Phillips is a substantial producer of crude oil in the Como area or petitioners' "Area II" with some 16,000 acres of leases. (Plfs. Ex. 16b, July 14, 1964)

The Como area had considerable potential to produce oil at higher rates than the Phillips forecast had indicated and the chances for additional oil in a growing area were attractive. (App., p. 351, 679-681) The extension of the Phillips line from "Area I" and "Area II" was made along an existing natural gas pipeline right of way already owned by Phillips. Dan Cameron testified that the type of oil produced in the area was in demand and that sulphur content relates to the desirability of crude oil for certain refineries. He also recognized that for an oil company to extend its lines into a new area, it could have as its motive the obtaining of its requirements for a particular type of crude oil for its refinery, and that this would be a legitimate motivation where existing production for an old area was declining. (App., p. 235)

The decision of Phillips to construct a pipeline from Camrick to Como appears to play a major role in petitioners' allegations. The petitioners themselves introduced the deposition testimony of John Houchin, member of the Phillips Executive Committee who was responsible for the supply and transportation department of Phillips headed

by Mr. Fair, on how the decision to build the Phillips line occurred. Fair reported to Houchin on July 29, 1964, that Panotex had announced the construction of a pipeline into the Como area. Since Cameron had written commitments from approximately 80% of the producers it is clear that Phillips had to act when it did if it intended to continue to compete for the oil. One of petitioners' witnesses testified that unless competing lines move into a field at about the same time, there is never but one line in the field and no competition exists in the acquisition of the producer's oil (App., p. 734, 735, 818-819), but that when two competing pipelines move into an area at about the same time, there can be a splitup in the lease connections, with the producers having a choice in deciding with whom they will deal. (App., p. 734-735)

There is no evidence that petitioners' "Areas I, II, and III" constitute separate markets or even one market. The only thing that petitioners' witness testified to was the name of the fields located in these circles drawn on a map. (App., p. 522-532) In fact, Plaintiffs' Exhibit 118 reflects a different "Area III" than their Exhibit 49. The witness who identified the fields testified that he did not know the basis for including the different fields in the circles or how the particular areas were determined. (App., p. 648-649) After this arbitrary designation, Phillips had a pipeline in "Area I", Phillips and Panotex have pipelines in "Area II", and Panotex and Shamrock have pipelines in "Area III".

The contention that the relevant market in this case constituted a "natural monopoly" and that the Panotex line

had a right to be the only pipeline because it was the first pipeline to announce construction was answered by the lower court:

> "It is a fact also that a pipeline tends to be a natural monopoly. Plaintiffs offered testimony to the effect that the first pipeline into an area customarily gets the connections that are available in the oil fields. If two lines enter at about the same time, they are likely to divide the available production." (Opn., App., p. 11a)
>
> * * *
>
> "* * * the fact that a pipeline can be a natural monopoly does not mean it is protected from competition." (Opn., App., p. 23a)

This is exactly what happened in the present case since all of the pipelines in petitioners' "Areas II and III" were constructed at approximately the same time. There is no evidence that any of the pipelines have been unprofitable, but even if a situation had existed where the relevant market would support but one pipeline, the producers had a right for competition to exist.

Cameron and Panotex place great emphasis upon the word "control". In the minutes of Phillips Committee reports, the statement is made that it would be in Phillips "best interest to control a large percentage of the crude oil reserves serving its refineries", and that "Unless Phillips is able to purchase this crude on the basis outlined above other purchasers may lay a line to the area and obtain control of the oil." This is only a recognition that trucks cannot compete with pipelines, and a reference to the normal control which a pipeline provides. The court of appeals ob-

served that a trucking operation is not competitive with a pipeline. (Opn., App., p. 11a) Phillips had been obtaining oil from its own leases and others in "Area II" by truck, and desired to be in a position to continue to compete for the oil. In order to do so it was necessary to construct a pipeline because petitioners were about to construct a pipeline. In any event, it is clearly lawful to change competitive methods by using a superior method of transporting, and the petitioners' pipeline had the same "control" over production that the Phillips pipeline had.

Much of petitioners' argument is based upon the contention that the Phillips line was uneconomic, and the assertion that the tariff agreement between Phillips and Phillips Pipe Line was a subsidy of an uneconomic line. Phillips Pipe Line Company did not deal with the producers or consider questions relating to the price to be paid by Phillips for purchased oil. In fact, the personnel of Phillips Pipe Line, who worked on the project, were not aware of Panotex or Shamrock's proposal. (App., p. 377-378, 379, 380-381, 384-385) Petitioners completely failed to establish that the Phillips line was uneconomic, or that Phillips believed that the line would be uneconomic at the time it was built. Their argument is in large part based upon the change in the amortization charge.

Before the actual construction of the Panotex line was announced, Phillips had made several formal written proposals to the producers for the construction of a pipeline to these fields. In 1962, Phillips had offered the producers a proposed extension from the Camrick area to the Como

area. This proposal used an amortization charge of 17¢ per barrel (Plfs. Ex. 56-f-1), and a 24.5¢ per barrel tariff that was based upon a forecast of 10,000 barrels over a ten-year period. (App., p. 487-489, Plfs. Ex. 16c, July 29, 1962) Although Phillips obtained some favorable responses to this offer, sufficient oil was not obtained to meet the amount of oil specified in the 1962 offer. (Opn., App., p. 17a)

In 1963, Phillips made a second offer to the producers in the Como area. The oil that was forecast upon which this proposal was based had increased eleven million four hundred thousand barrels since the last proposal. (Plfs. Ex. 16c, February 22, 1963) Phillips made a third offer to producers to construct a pipeline in the Como area on July 20, 1964. This offer was cancellable on twenty-four hours' notice and called for a line to be built when 6,000 barrels per day were available and included the Balko, Elmwood, Como, and Logan fields. A producer amortization charge of 10¢ rather than 17¢ was proposed.

The reason cited by the Executive Committee for the disapproval of a recommended 17¢ amortization was that the long term of the proposed contract and the amount of the charge were simply not acceptable to the producers. Also, the reduction in tariff by Phillips Pipe Line Company from 24.5¢ to 17.5¢ must be viewed in light of the fact that the 24.5¢ tariff was based upon 10,000,000 barrels to be transported to the line while the 17.5¢ charge was based upon a total of 22,140,000 barrels. (Plfs. Exs. 16c, 17-q) Plaintiffs offered no proof that either proposal would not provide the pipeline company its normal return of 6 to 8%.

As it turned out both Cameron and Phillips paid the same net price to producers.

In that Phillips Pipe Line Company was acting as a common carrier, it was necessary for Phillips not to violate the Elkins Act, 49 U.S.C.A. § 41(1), (2), and (3), and the Common Purchaser Statutes of both Texas and Oklahoma, Art. 6049a, et. seq., Tex. Rev. Civ. Stat., and 52 Okla. Stat. § 54. The Elkins Act prohibits any kind of discrimination, such as indirect rebates in favor of Phillips by the pipeline subsidiary, and the aforementioned state laws also oppose discrimination in price between various producers. Phillips could not cause Phillips Pipe Line Company to build a line without providing for an adequate tariff. A tariff had to be charged that would not discriminate against shippers using other lines of the pipeline company. It was not possible to set a fixed tariff because Phillips did not know how much production it would receive or how far the line would extend, and thus the amount of the investment which would be required. Phillips agreed to pay a tariff that was flexible to the extent that it could be revised upward if needed to provide the normal return to the pipeline subsidiary. This agreement was made to avoid any question of discrimination or indirect rebates in favor of Phillips under the Elkins Act, 49 U.S.C.A. § 41(1), (2), and (3).

Petitioners' contention that the Phillips line was uneconomic was not supported by the record. As mentioned, the Phillips Executive Committee had previously approved a fixed tariff for the proposed pipeline that was based on a specified number of barrels. (Plfs. Ex. No. 16c) Since that

number of barrels was not assured because of the activities of other crude purchasers, the Executive Committee upon the request of Mr. Houchin authorized Phillips pipeline to charge whatever tariff was necessary to return the pipeline company its normal rate of return on the actual number of barrels transported through the line. (App., p. 492-502) Phillips and Phillips Pipe Line entered into a written agreement to that effect. (Plfs. Ex. No. 17-q) Houchin made the decision to proceed to build the line so that Phillips would be in a position to obtain the oil from its own leases and to compete for the oil which it might purchase from others. (App., p. 493, 501-502)

The argument that a conspiracy was established by the telephone call from Cash of Shamrock to Harris of Phillips, along with the fact that Phillips did not extend its pipeline into Logan, is without merit. The petitioners themselves introduced the deposition testimony of Mr. Cash and having knowingly introduced that evidence they are bound by it. They also established that when Cash inquired if Phillips had an interest in the Logan area he was told that Phillips did have such an interest and that he replied, "Well, we think we need that crude oil as a future supply of crude oil for our refinery and we are going to have to go in there, too, and I said, it won't be the first time that we have been competitors and that was all of our conversation."

The Phillips line did not actually extend into Logan (Area III). Phillips made the same offer to the producers in Logan that it extended to the producers in petitioners'

"Area II" but no producer accepted that offer. In order for Phillips to obtain production of producers committed to petitioners it would have had to raise its posted price throughout the Texas and Oklahoma Panhandles. The amount of oil available did not warrant Phillips raising its posted price. One can be sure that petitioners would have complained if Phillips had taken this action. As was noted by the lower court:

> "Plaintiffs make much of the fact that Shamrock extended to Logan and Phillips did not. Phillips went no further east than the Como field in Area II while Shamrock went no further west than Logan. Standing alone, this might give rise to an inference of a division of markets between Phillips and Shamrock to the detriment of their mutual competitor, Panotex. But this evidence does not stand alone.
>
> "Phillips had been seeking commitments in the Logan area without success. Panotex had every producer in the field except one. Shamrock acquired that one. The interest of Phillips was such that it staked a right of way into Logan but abandoned the prospect for lack of business.
>
> "Phillips had production of its own in the Como field and some additional suppliers. These facts gave good reason for Phillips to stop at Como and for Shamrock to stop at Logan." (Opn., App., p. 22a)

Petitioners themselves disproved the unsupported allegation that Phillips interfered with their financing of the Panotex line at a Houston bank. Although the Petitioners established that Phillips had made deposits in the bank, these occurred before the bank ever heard of the Panotex project. (App., p. 753-754) Petitioners knowingly intro-

duced the deposition testimony of the bank loan officer who dealt with petitioners. He testified that the bank required that Panotex "get the oil tied up" because there was "a lot of competition in getting it tied up" (App., p. 307-309), and that Panotex furnish evidence of a long-term contract for the sale of the oil that it planned to gather and move to Elk City. (App., p. 290-292) The bank was troubled because its requirements were not met. (App., p. 291-310) The bank's consultant contacted Phillips, Humble and Shell about committing their oil to the Panotex line (App., p. 318-319), and Phillips informed the consultant that it would not commit its oil to the proposed line because "this is a very desirable crude." (App., p. 325-327, 329-331) In fact, this was the only contact with Phillips and the bank never refused to finance the project. As was noted by the lower court: " * * * There is no evidence that Phillips influenced by word or deed the decision not to make the loan. There the matter ends." (Opn., App., p. 20a) Also, in this regard, the action of the court of appeals in affirming the district court's exclusion of hearsay statements of the petitioners' agent was in all respects correct. As was noted:

> " * * * The court properly refused to admit the conclusions and opinions of Cameron's agent which were contained in the letters and memoranda. They were not admissible under the Business Records Act, 28 USCA, § 1732(a); *Standard Oil Company of California v. Moore*, 9 Cir., 1957, 251 F. 2d 188, 213-14." (Opn., App., p. 9a, 10a)

The fact of the matter is that the petitioners themselves by deposition testimony introduced the exact reason why the

Houston bank did not finance the Panotex project and they are bound by this testimony.

ARGUMENT

The petition for a writ of certiorari should be denied in that it seeks a review of a lower court decision that turns solely upon an analysis of the particular facts involved. *United States v. Johnson*, 268 U.S. 220, 45 S. Ct. 496, 69 L. Ed. 925 (1925). The only real question presented is whether there was any evidence or reasonable inference in the record of an antitrust violation by respondents which injured the petitioners in their business or property. The trial court said no after hearing all the evidence. After reviewing the entire record, the court of appeals agreed. Thus "a court of law such as this court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 69 S. Ct. 535, 93 L. Ed. 672 (1949) and *Berenyi v. Immigration Service*, 385 U.S. 630, 87 S. Ct. 666, 17 L. Ed. 2d 656 (1967).

I.

THE PETITIONERS WERE NOT PREJUDICED BY THE ENTRY OF DIRECTED VERDICTS AT A POINT IN TRIAL AFTER THEY HAD RESTED AND IT WAS PROPER TO CONSIDER ALL THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THEM.

The court of appeals announced no new proposition of law and its decision is limited to these facts. There is no

substantial question present. The petitioners were not prejudiced by the fact that the trial court entered directed verdicts at a point in trial after they had rested. Petitioners asked the lower court to apply the sufficiency of the evidence test set forth in *Boeing Company v. Shipman*, 411 F. 2d 365 (5th Cir. 1969), the lower court correctly did so, and petitioners cannot now complain.

When the Judgment of the trial court and the opinion of the lower court are considered, it is clear that their argument is without merit, because petitioners received the most favorable review possible. The judgment entered by the trial court provides in part as follows:

> "The court having considered defendant Phillips Petroleum Company's motion for directed verdict as to plaintiffs' action against it, the court determined and announced that the motion of Phillips Petroleum Company for directed verdict as to plaintiffs' action against it should be and was granted. Further, the court after viewing all the evidence in the light most favorable to plaintiffs, *and considering only the evidence and reasonable inferences which support plaintiffs' theory, and giving the evidence all inferences most favorable to plaintiffs*, is of the opinion and finds that there is no fact issue for the jury with respect to plaintiffs' action against Phillips Petroleum Company, and no evidence with respect to which a jury of reasonable men could differ on the conclusions to be reached from the evidence with respect to plaintiffs' action against Phillips Petroleum Company;" (App., p. 85) (emphasis supplied)

Petitioners have changed their position. Now they complain that the Fifth Circuit Court of Appeals should not have used the test set forth in *Boeing Company v. Ship-*

man, 411 F. 2d 365 (5th Cir. 1969). This is *not* what they said when they were before the lower court. In the Brief for Appellants in the court of appeals, petitioners stated:

> "The test for determining whether a directed verdict should be granted was laid down by this Court in *Boeing Company v. Shipman*, 411 F. 2d 365, 374-375 (1969) *(en banc)*:
>
> > 'On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence * * *'
>
> * * *
>
> "This standard was recently applied by this Court in an antitrust case presenting certain of the issues raised by this appeal. *Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America*, 438 F. 2d 1286 (5th Cir. 1971)." (Brf. for Appellants in Ct. of Appls., p. 34, 35)

In discussing the test to be applied, the lower court held, as petitioners had asked them to hold, that:

> "We now turn to question whether the court erred in directing verdicts for defendants or either of them. The test to be applied is the now familiar one of *Boeing Company v. Shipman*, 5 Cir., 1969, 411 F. 2d 365 (en banc), where we said:
>
> > 'On motions for directed verdict * * * the Court should consider all of the evidence — not just that evidence which supports the nonmover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is,

> evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury.' 411 F. 2d at 374." (Opn., App., p. 10a, 11a)

Now petitioners say that the Court should *not* consider all the evidence and that it was improper to use the standard set forth in *Boeing Company v. Shipman, supra.* The most one can say of petitioners' position is that it is flexible.

Although the court of appeals noted that Rule 50 of the Federal Rules of Civil Procedure contained no restriction on the granting of a motion for directed verdict during the presentation of a defendant's case and that no authority supporting such a restriction had been found, the Court expressly held that it was not necessary for it to reach this question. Instead, the lower court found that petitioners had not been prejudiced by the procedure which was followed. The court of appeals held:

> "In the end, the question of directing a verdict for a defendant during the defendant's presentation is one of orderly procedure in the frame of reference of trial court discretion, procedural due process, and a fair trial. Here there is nothing of record to support any denigration of procedural due process or the essence of a fair trial. Thus we find no error as claimed." (Opn., App., p. 6a)

The trial court considered only the evidence and reasonable inferences which supported the petitioners' theory and gave the evidence all inferences most favorable to them. The trial court did not grant the directed verdicts on the

basis of affirmative defenses, or consider any of the evidence favorable for the respondents or any of the evidence that conflicted with petitioners' evidence. In short, there was nothing for petitioners to rebut. The evidence offered by the petitioners and the favorable evidence for petitioners, if any, introduced after they had rested, did not raise any fact issue that Phillips had violated the Sherman Act.

It should be made clear that petitioners failed to inform the trial court of any evidence they had to offer, which would have created a jury question although they had ample opportunity to do so. Rule 46 of the Federal Rules of Civil Procedure require that the complaining party make known the ground for objection to the granting of motions. Petitioners have waived their point on appeal. *Colonial Refrigerated Transportation v. Mitchell*, 403 F. 2d 541 (5th Cir. 1968); *Jones v. Home Transportation Co.*, 422 F. 2d 179 (5th Cir. 1970); *Knight v. Loverman, Joseph & Loeb*, 217 F. 2d 717, 719 (5th Cir. 1954); *U. S. v. McRoberts*, 409 F. 2d 195 (9th Cir. 1969), *cert. denied*, 396 U.S. 1014.

With regard to the contention that it was improper to consider all of the evidence presented it should first be noted that the provision in the Judgment and statement of the trial court that the "motions for instructed verdict are granted upon the state of the record at the time the motions were granted" was included on the specific request of petitioners' counsel. (App., p. 1207) No request to consider just the evidence introduced prior to respondent presenting evidence was made. Also petitioners' assertion that "the trial court had reserved to Cameron-Panotex the right

to introduce evidence in rebuttal" is incorrect. Although petitioners requested permission of the trial court *not* to put on all their case prior to resting, this request was denied. The trial court's reason was "to get all the evidence in so I could have everything before me that you (petitioners) had to offer" for the test of a motion for instructed verdict. Also, petitioners' references to the colloquy between court and counsel on the evidence is misleading. This reference seemed to indicate that the trial court believed that there was a fact question for the jury, but these observations gave way to the trial court's final decision and recitation in the judgment.

Aside from the fact that the petitioners specifically requested and asked the court to have the record reflect that the directed verdicts were being granted upon the state of the record at the time the motions were granted, it is clear that the procedure which was followed was the most favorable to petitioners. Both the trial court and the court of appeals followed the proper procedure. *Boeing Company v. Shipman*, 411 F. 2d 365 (5th Cir. 1969) which was decided *en banc* has established the proper standards for consideration of motions for directed verdict in the Fifth Circuit since that case was decided on April 7, 1969. This case contains an exhaustive review and analysis of the distinction between Federal Employee Liability Act cases such as *Wilkerson v. McCarthy*, 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (1949) and other cases. *Boeing Company v. Shipman, supra*, used the following language:

> "As a corollary to the unique statutory context of FELA actions, it is apparent that in the general run

of cases federal courts have rejected the legendary 'scintilla' test. Gunning v. Cooley, 281 U.S. 90, 50 S. Ct. 231, 74 L. Ed. 720 (1930). In 5 Moore, Federal Practice ¶ 50.02 [1], p. 2324 (2d ed. 1968), we find the following pertinent commentary:

> 'The federal courts are generally committed to a rejection of the so-called "scintilla rule," by which a court might not direct a verdict so long as there is any evidence in support of the proposition tendered by the party against whom the motion is directed. An argument might well be made that such a rule survives, in fact, if not in name, in FELA and Jones Act cases. [See e.g., Harlan, J., dissenting in Ferguson v. Moore-McCormack Lines (1957) 352 U.S. 521, 563-564, 77 S. Ct. 457, 480, 1 L. Ed. 2d 511, 519.] If so, its application is limited to those areas and cannot be extended beyond those special domains.'

"We agree with Professor Moore's analysis and conclusion that the FELA test should not be employed as a vehicle to re-establish the 'scintilla' rule which has been so firmly rejected by the federal judiciary."

* * *

"Finally, the Seventh Amendment of the United States Constitution providing for trial by jury does not require, either expressly or impliedly, that the test of sufficiency of evidence to create a jury question in a non-FELA federal case be the same as in an FELA case. The tendency of some federal courts, at times, to use overly broad language or to cite indiscriminately FELA cases in non-FELA situations does not obviate this conclusion. See, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 700-701, 82 S. Ct. 1404, 1411, 8 L. Ed. 2d 777 (1962); Harris v. Pennsylvania Railroad Co., 361 U.S. 15, 16, 80 St. Ct. 22, 23, 4 L. Ed. 2d 1 (1959) (Mr. Justice Douglas, concur-

ring); Bruce Lincoln-Mercury, Inc. v. Universal C.I.T. Credit Corp., 3 Cir., 1963, 325 F. 2d 2, 22."

It must also be remembered that in this case we do not have a situation where the trial court considered any evidence introduced by the respondents which was favorable to the respondents in connection with the determination of whether or not directed verdicts should be rendered. The trial court expressly stated that it was "considering *only* the evidence and reasonable inferences which support Plaintiffs' theory, and giving the evidence all inferences most favorable to Plaintiffs." (App., p. 85) (emphasis supplied) The United States Court of Appeals for the Fifth Circuit used the following language:

> "At the same hearing, plaintiffs urged the court to make it clear in the final judgment that the motions for directed verdicts were granted on the state of the record at the time the motions were granted. The court and all counsel agreed that this was the case and the judgment so provides."
>
> * * *
>
> "This case began in 1964. It has been strenuously developed through discovery and otherwise. It occupied more than two weeks of trial time. In the end there is no substance to plaintiffs' claims. Under the test of viewing the evidence in the light most favorable to plaintiffs and giving them the benefit of all inferences which might reasonably be drawn from established facts, we have nothing more than competition between the parties." (Opn., App., p. 4a, 22a, 23a)

The record presents no legal issue which will govern other cases, only a factual situation of interest only to the parties. There is no issue of public importance.

II.

IT IS NOT NECESSARY TO DETERMINE THE HYPOTHETICAL DANGEROUS PROBABILITY QUESTION.

The petition raises no legal or policy question fundamental to the effective administration of private antitrust actions. A fair reading of the opinion of the court of appeals reflects that the lower court found that petitioners had failed to introduce any evidence of an attempt to monopolize, not just that Petitioners had only failed to establish a dangerous probability of success. The necessity of establishing probability is hypothetical under the circumstances of this case and a writ of certiorari should not issue, particularly where petitioners assumed that they had the burden of establishing dangerous probability in the court of appeals and based their argument on the contention that they had met this burden. Again, petitioners urge this court to pass on matters which were not at issue in the lower court and which need not be decided by this Court. In the court of appeals, petitioners argued that "There was a dangerous probabilty that Phillips' and Shamrock's attempts to monopolize would succeed", rather than taking the position that it was not necessary to establish that there was a dangerous probability of success. They stated in their brief before the lower court that:

> "Whether there must be proof of a relevant market or a dangerous probability of monopolization is open to 'some dispute.' See authorities cited in Woods, supra, at p. 7. However, it will be assumed here that three elements must be shown, namely; (i) the relevant market, (ii) specific intent to monopolize this market

and *(iii) a dangerous probability of success.*" (Brf. for Appellants, Ct. of Appls., p. 41) (emphasis supplied)

The record, judgment of the trial court, and opinion of the court of appeals reflects that petitioners failed to establish any of the necessary elements of an attempt to monopolize charge, not just dangerous probability of success.

The lower court held:

> "At this point we find that the evidence of a conspiracy between Phillips and its pipeline subsidiary is nonexistent from the point of showing a violation of §§ 1 or 2 of the Sherman Act.
>
> "This is likewise true as to a showing an attempt to monopolize on the part of Phillips. Assuming *arguendo* intent and a relevant market, a dangerous probability of success is clearly lacking. See *Cliff Food Stores, Inc., v. Kroger, Inc.*, 5 Cir., 1969, 417 F. 2d 203, 206-08.
>
> "The action of Phillips in extending into Area II did not rise above a protective motive. Phillips was already present through a trucking operation and through its own production. Panotex was transporting in another direction and away from Phillips' refinery. Protection of its refinery by the assurance of some of the oil reserves in Area II was no more than a normal business practice absent conduct calculated to bar the entry of a competitor into Area II or to drive a competitor out of the area. The proof disclosed no such conduct on the part of Phillips. There was no proof of predatory conduct or of conduct which was illegal per se. It follows that the proof was insufficient to make a jury question as to a restraint of trade by Phillips from the conduct disclosed to this point." (Opin., App., p. 18a, 19a)

The court of appeals based its holding that the trial court was correct in directing a verdict for Phillips on the attempt to monopolize allegation on the fact that there was a complete failure of proof. This is made clear by the lower court's holding that it found "no evidence of an illegal restraint or of a proscribed attempt to monopolize on the part of Defendants individually or collectively." (Opn., App., p. 23a) The decision below is correct.

III.

THERE WAS NO EVIDENCE OF ANY UNLAWFUL AGREEMENT BETWEEN PHILLIPS AND ITS WHOLLY-OWNED PIPELINE SUBSIDIARY.

The Court of Appeals ruling with respect to the transaction between Phillips Petroleum Company and its wholly-owned subsidiary, Phillips Pipe Line Company, presents no substantial questions under the antitrust laws. Both the trial court and court of appeals carefully considered and reviewed the facts, applied the well established principles and standards of the antitrust law and concluded that there was no violation of the antitrust law. The record is one of allowable competition — nothing more.

There is no evidence of any unlawful agreement between Phillips and its pipeline subsidiary. Phillips had been purchasing oil from the Como area for its refinery by truck for several years. As previously noted, petitioners' witnesses testified that trucks cannot compete with a pipeline and that the first line in an area ordinarily obtains all the production unless two lines come in at about the same time,

in which event, the production may be split between the pipelines. If Phillips did nothing at the time the Panotex line was announced its trucks would have to compete with a pipeline and production which it had been receiving would be lost. Its only alternative was to cause its subsidiary to construct a pipeline so that it would be in a position to compete.

As stated previously the Elkins Act makes it unlawful for a common carrier pipeline to pay an indirect rebate. Phillips had to agree on a tariff which would give its subsidiary a normal return on the investment, but, to set such a tariff, one must know how much oil will be transported and how far the line will extend or the amount of investment that will be required. Phillips did not have this information. Since effective competition can occur only when two lines go into an area at about the same time Phillips agreed to pay its subsidiary whatever tariff was required to give its subsidiary its normal return. Phillips only took that action which was necessary to be in a position to compete for crude oil. The tariff agreement was used to avoid an indirect rebate and violation of the Elkins Act. The timing of the extension and the tariff agreement were neither exclusionary or unfair.

The trial court and the appellate court after considering and reviewing the evidence concluded that the transactions between Phillips Petroleum Company and Phillips Pipe Line Company amounted to nothing more than a proper

business motive under the circumstances, no intent to monopolize, no conspiracy, and no showing of a dangerous probability of the success of any attempt to monopolize. Under a Texas statute (Art. 2.01 B(3) (b), V.A.T.S. Bus. Corp. Act) a refinery who also happens to be an oil producer must use a subsidiary to build and operate a common carrier oil pipeline. Unless a subsidiary is used, the refiner would be dependent upon someone else building a common carrier pipeline to his refinery, which no one else is going to do when the refinery is the only one at a remote place near Borger, Texas. Otherwise, the refinery will be dependent on trucked crude oil, a more costly method of transportation. This is the common manner used by the oil industry in building pipelines which supply refineries. Complying with this local law, a law designed to avoid an environment where the oil producer might tend to favor its own production over that of other producers, does not affect other pipeline competition. Cameron also used a subsidiary to build and operate the Panotex line. The mere fact that Phillips Petroleum Company and Phillips Pipe Line Company entered into a contract to accomplish a proper business motive under the circumstances can in no manner be used to show an intent to monopolize simply because it resulted in competition for Cameron.

The petition can best be summarized as an effort of the petitioners to review or reargue the evidence and the inferences they claim to be drawn therefrom and to inject factual claims which do not exist. The trial court found

there was no question for the jury. The United States Court of Appeals after extensive study of the record concluded:

> "In meeting the Panotex competition, Phillips took three simultaneous steps: (1) it met Cameron's price offer; (2) it met Cameron's contract requirements as to period of contract; (3) it guaranteed its pipeline subsidiary a seven per cent return so as to replace its trucking operation with a pipeline. The proof stops here. It goes no further than to show that Phillips needed the oil for its refinery and would be preempted by the entry and consequent monopoly of another pipeline. It is true that the evidence shows that Phillips considered Area II as 'its own backyard' and sought to protect its position in the area. This, however, amounts to nothing more than a proper business motive under the circumstances. Cf. *Times-Picayune Publishing Company v. United States*, 1953, 345 U.S. 594, 627, 73 S. Ct. 872, 97 L. Ed. 1277, on the necessity to prove something more than a 'step predominantly motivated by legitimate business aims * * *' to show an intent to monopolize." (Opn., App., p. 18a)

As was noted by the court of appeals:

> "It seems implicit in plaintiffs' position that they view the law as protecting them from competition, whether from those already in the market or from newcomers to the market. This is not the law * * * after having considered all of the evidence and every contention made by plaintiffs, we find no evidence of an illegal restraint or of a proscribed attempt to monopolize on the part of defendants, individually or collectively. The record is one of allowable competition — nothing more." (Opn., App., p. 23a)

Without this competition, Cameron would be the only purchaser and Panotex the only transporter of crude oil in what petitioners contend is the relevant market.

CONCLUSION

On the record before this Court, there is no substantial question or legal issue of public importance. Petitioners have failed to assert any valid reason why this court should grant certiorari. The opinion of the lower court is well reasoned and is in accord with existing legal precedents. The petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, counsel of record herein for respondent, Phillips Petroleum Company, does certify that service of the above and foregoing Brief For Respondent Phillips Petroleum Company In Opposition, was this day accomplished pursuant to Rule 33(1) of the Rules of this Court by depositing four copies of same in a United States Post Office mail box, with air mail postage prepaid, by certified mail with return receipt requested, addressed to Mr. Urban Lester, 1776 K Street, N.W., Suite 709, Washington, D.C. 20006, counsel of record herein for petitioners, Panotex Pipe Line Company and Cameron Crude Oil Corporation; and Mr. W. M. Sutton, Amarillo National Bank Building, Amarillo, Texas, counsel of record herein for respondent, Diamond Shamrock Corporation.

June 14, 1972

Morris Harrell

Morris Harrell
Counsel for Respondent
Phillips Petroleum Company

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1335

PANOTEX PIPE LINE COMPANY, ET AL,
Plaintiffs-Appellants,

versus

PHILLIPS PETROLEUM COMPANY and
DIAMOND SHAMROCK CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

(February 17, 1972)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

BELL, Circuit Judge: This appeal arises out of antitrust litigation. The district court directed verdicts for the defendants. We affirm.

Cameron and its pipeline subsidiary, Panotex, claimed damages jointly and severally against Phillips

and Shamrock, alleging a conspiracy between them, and also a conspiracy between each of them and their respective subsidiaries, Phillips Pipe Line Company and Shamrock Pipe Line Corporation. The gist of the complaint was a conspiracy, as stated, to restrain and monopolize, and to attempt to monopolize interstate commerce in the purchase and transportation of crude oil in designated areas in violation of §§ 1 and 2 of the Sherman Act. 15 USCA, §§ 1 and 2. The cause of action also alleged individual conduct on the part of Phillips and Shamrock in violation of the same statutes. The prayer was for damages and injunctive relief under §§ 4 and 16 of the Clayton Act. 15 USCA, §§ 15 and 26. The complaint and the evidence introduced in support thereof bottoms out as a claim that defendants attempted to foreclose a competitor, and having failed in that, to thereafter restrict the competitor.

The cause was tried to a jury. Motions for directed verdicts filed by Phillips and Shamrock were denied by the district court at the close of plaintiffs' case. Defendant Phillips then proceeded to put on its defense. Shamrock put in a part of its evidence through cross-examination of witnesses for Phillips. After two days of defense evidence, the court suggested, sua sponte, that Shamrock again move for a directed verdict. Shamrock so moved and the motion was granted. Phillips then asked for the same relief and its motion was granted. Counterclaims against Cameron and Panotex were severed and are not a part of this appeal.

There are three assignments of error. First, plaintiffs urge that it was prejudicial procedural error to

grant motions for directed verdicts in the middle of defendants' cases, i.e., at a random time during the trial. The contention is that a directed verdict may be granted under Rule 50, F.R.Civ.P., only after the opening statement of opposing counsel, at the close of the evidence offered by an opponent, or at the close of all of the evidence, citing 5A Moore's Federal Practice, par. 50.04. Plaintiffs also assign error on a substantive basis in the granting of directed verdicts, urging that the evidence was sufficient to make a jury question. Lastly, error is asserted on the basis of the exclusion of certain items of evidence offered by plaintiffs.

The facts will be detailed in connection with the discussion of the alleged substantive error in directing verdicts for defendants. We proceed first to a discussion of the claimed procedural error.

I.

The motions for directed verdict were granted during the presentation of the defense testimony. There was extensive colloquy between the court and counsel. The posture of the case at the time was somewhat complex in that the counterclaims of each defendant based on alleged antitrust violations by plaintiffs were being tried to the same jury. Plaintiffs' proof was voluminous and the court indicated that it had reviewed all of the testimony to date and was inclined to reconsider the motion of Shamrock for a directed verdict, and also to sever Shamrock's counterclaim. (This was the previously overruled motion for directed verdict.)

The court then ruled as indicated for Shamrock. At that point, plaintiffs joined with Phillips in moving for a mistrial because of the hiatus and confusion left in the proof as to liability and damages due to the removal of Shamrock. Phillips had moved for a directed verdict following the grant of Shamrock's motion but this motion was overruled. Following the joint motion for mistrial, the court reconsidered and granted Phillips' motion for directed verdict and also severed its counterclaim.

At no time during the proceeding did plaintiffs offer any objection whatever to the timing of the directed verdicts. Moreover, nothing was said during the proceeding which pointed to any prejudice to plaintiffs from the standpoint of timing.

There was a hearing on the form of the final judgment about a month later. At this hearing, plaintiffs took the position for the first time that they were prejudiced by the timing of the grant of the motions in that they had previously reserved the right to redirect examination of certain witnesses. The record does not reflect this reservation. The court, in fact, required plaintiffs to complete their case prior to closing.

At the same hearing, plaintiffs urged the court to make it clear in the final judgment that the motions for directed verdicts were granted on the state of the record at the time the motions were granted. The court and all counsel agreed that this was the case and the judgment so provides. Having this in mind, plaintiffs take a different position here with respect to prejudice.

They no longer urge the reservation of the right to redirect examination of the witnesses. They now contend that the court granted them the right to rebut evidence put in by Phillips in two instances. This evidence, produced from the files of Shell Oil Company, consisted of commitments to Cameron from oil producers to sell crude oil for transportation by Panotex. The pipeline of Panotex connected with that of Shell and all Cameron sales were to Shell. The other evidence was the record of oill deliveries from Cameron to Shell via Panotex. We are unable to perceive the need to rebut this evidence. We are not told how it could be rebutted, nor how it was in anyway prejudicial. We find no prejudice to plaintiffs in these events.

We do not reach the question whether Rule 50, F.R. Civ. P.,[1] prohibits the granting of a motion for directed

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[1]Rule 50:

"(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

"(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. . . ."

verdict during the presentation of a defendant's case. The rule contains no such restriction nor have we found any authority supporting such a restriction. Indeed, we have found no case in point one way or the other. The Supreme Court long ago pointed to the salutary purpose of a motion for directed verdict. In *Merchants' National Bank of Boston v. The State National Bank of Boston*, 1871, 77 U.S. 604, 19 L.Ed. 1008, it was said with reference thereto:

> "According to the settled practice in the courts of the United States, it was proper to give the instruction if it were clear the plaintiff could not recover. It would have been idle to proceed further when such must be the inevitable result. The practice is a wise one. It saves time and costs; it gives the certainty of applied science to the results of judicial investigation; it draws clearly the line which separates the provinces of the judge and the jury, and fixes where it belongs the responsibility which should be assumed by the court." 77 U.S. at 637

In the end, the question of directing a verdict for a defendant during the defendant's presentation is one of orderly procedure in the frame of reference of trial court discretion, procedural due process, and a fair trial. Here there is nothing of record to support any denigration of procedural due process or the essence of a fair trial. Thus we find no error as claimed.

From the view that plaintiffs must show prejudice, the situation is analogous to federal criminal procedure where the court commits error by reserving a ruling on a defendant's motion to acquit. The error is harmless absent a showing that the evidence was insufficient to sustain a conviction when the government rested its case. *Cooper v. United States*, 5 Cir., 1963, 321 F.2d 274, 277; *Montoya v. United States*, 5 Cir., 1968, 402 F.2d 847, 849-50; *United States v. Day*, 5 Cir., 1971, 438 F.2d 121, 122.

As Justice Field stated for the court in *Oscanyan v. Winchester Repeating Arms Company*, 1881, 103 U.S. 261, 26 L.Ed. 539, in a case where a verdict was directed following the opening statement of counsel:

> "... if in the progress of a trial, either by such admission [of counsel] or proof, a fact is developed which must necessarily put an end to the action, the court may, upon its own motion or that of counsel, act upon it and close the case." 103 U.S. at 263

II.

Before considering the merits of the action of the district court in granting the motions for directed verdict, it will be necessary to resolve the question presented with respect to the exclusion of certain evidence offered by plaintiffs. This question involves three separate items.

The first item is an inter-corporate letter from one Phillips employee to another, dated November 11, 1960, setting out the general situation in the industry as to oil reserves in the general geographical area pertinent to this suit. The letter mentions the prospect of raiding Shamrock's customers to increase Phillips' crude oil supply. The crude oil reserves and acquisition prospects of many oil companies in the area are also discussed. The position of plaintiffs is that this letter was admissible to show motive for later concerted action between Phillips and Shamrock. The district court excluded it on the ground that it originated prior to the period of activities giving rise to the suit.

We hold that this letter was admissible, and was to be given such weight as it might deserve in light of the proof, if any, as to any future concerted action between Phillips and Shamrock. Cf. *Federal Trade Commission v. Cement Institute*, 1948, 333 U.S. 683, 705, 68 S.Ct. 793, 92 L.Ed. 1010. Accordingly, it will be considered here in determining whether verdicts should have been directed.

The next item was a contract showing that Shamrock purchased casinghead gas from oil producers. Plaintiffs, not having a refinery, purchased only crude oil and condensate. The argument is that Shamrock used casinghead gas purchases as a lever to obtain contracts for the purchase of crude oil and condensate; hence, an illegal tying arrangement. The district court excluded this evidence on the ground that it was irrelevant to the pleadings.

Ordinarily this evidence would have been admissible to show the vehicle for an illegal tying arrangement as a part of an attempt to monopolize or restrain trade on the part of Shamrock. The admission would be subject, however, to the introduction of some evidence of a tying arrangment. There was no proffer of evidence to show such a tying arrangement at the time this evidence was excluded nor at any other time. Thus the error was in the abstract and harmless.

The third item of evidence is a group of letters and memoranda having to do with the effort of Cameron to obtain a loan from the First National City Bank of Houston, Texas, with which to finance their proposed pipeline. The fact of attempting to obtain this loan was stipulated. There was also full testimony regarding the effort. Plaintiffs wished to put in such portions of the letters and memoranda as would reflect Phillips' alleged antagonism to the proposed pipeline and as would provide a basis for an inference that the loan was not made because of Phillips' influence over the bank. The district court excluded this evidence on grounds that the documents contained hearsay, as well as self serving opinions and conclusions on the part of a Cameron agent. With these objectionable portions removed from the documents, the court was of the opinion that nothing of coherent value would remain to be considered by the jury.

This evidence consisted of twelve letters and three memoranda prepared by Cameron's agent and one letter from an officer of the Houston bank regarding Cameron's application for the loan. The court properly

refused to admit the conclusions and opinions of Cameron's agent which were contained in the letters and memoranda. They were not admissible under the Business Records Act, 28 USCA, § 1732(a); *Standard Oil Company of California v. Moore*, 9 Cir., 1957, 251 F.2d 188, 213-14. No effort was made by plaintiffs to introduce the documents with the conclusions and opinions deleted and thus we need not consider whether the remaining documents or parts thereof qualified as an exception to the hearsay rule under the Business Records Act. The court did not err in excluding this evidence.

There is one other item of excluded evidence concerning which plaintiffs assign error but it goes to the question of damages. As will be seen, we do not reach the question of damages and thus it is unnecessary to consider this assignment of error.

III.

We now turn to question whether the court erred in directing verdicts for defendants or either of them. The test to be applied is the now familiar one of *Boeing Company v. Shipman*, 5 Cir., 1969, 411 F.2d 365 (en banc), where we said:

> "On motions for directed verdict ... the Court should consider all of the evidence — not just that evidence which supports the non-mover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and infer-

ences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury." 411 F.2d at 374.

Phillips and Shamrock were integrated oil companies in that they owned and operated refineries in the geographical area with which we are concerned. They transported their own production as well as the production of others to their refineries. The transportation was by their subsidiary pipeline companies. Cameron had no production but purchased from others for transportation over Panotex, its subsidiary, to Shell's pipeline.

It is a fact also that a pipeline tends to be a natural monopoly. Plaintiffs offered testimony to the effect that the first pipeline into an area customarily gets the connections that are available in the oil fields. If two lines enter at about the same time, they are likely to divide the available production. In addition, a trucking operation is not competitive with a pipeline.

As the Supreme Court has noted, *Federal Trade Commission v. Cement Institute*, supra; *Standard Oil Co. v. United States*, 1911, 221 U.S. 1, 46, 31 S.Ct. 502,

55 L.Ed. 619, evidence as to events prior to and following alleged antitrust activity is admissible if it tends to show the purpose and character of particular transactions under investigation. Thus it is that the charges against defendants must be viewed in the background of the facts as they existed prior to entry of Cameron and Panotex into the pipeline market; indeed prior to the creation and construction of Panotex.

Background and Relevant Markets

The controversy involves competition between three pipelines, Phillips, Shamrock and Panotex, in the general area of the Texas-Oklahoma border. Oil situated in two counties in Oklahoma is involved: Beaver and Texas Counties. These counties border on the north boundary of the State of Texas. Oil situated in ten Texas counties lying immediately south of these Oklahoma counties is also involved. The counties are Hansford, Ochiltree, Lipscomb, Moore, Hutchinson, Roberts, Hemphill, Carson, Gray and Wheeler.[2]

Phillips' refinery is in Hutchinson County. Shamrock's refinery is in Moore County. As of 1954, the crude oil for these refineries was supplied out of the Texas panhandle oil field, in Moore, Hutchinson, Roberts, Carson, Gray and Wheeler Counties. The reserves in this field were becoming inadequate to meet the needs of the refineries. New fields were being developed in the counties to the north and east. By 1957, Shamrock

[2]See Appendix A attached for a map of the general area and the pipelines pertinent to this litigation.

had extended its pipeline north into fields located in Hansford and Ochiltree Counties. Phillips remained in the panhandle.[3]

By 1961, Phillips had extended its pipeline through the southeast corner of Hansford County to connect one field, and on through Ochiltree County to connect with several fields and into Texas and Beaver Counties in Oklahoma (the Camrick area) to connect with fields there. Its pipeline crossed that of Shamrock in Ochiltree County.

In 1961, Cameron was engaged in purchasing crude oil in the Camrick area of Texas and Beaver Counties and transporting it by truck for resale. The Phillips pipeline extension into the Camrick area brought about a considerable reduction in Cameron's trucking business but that reduction is not a basis of the claim here.

In 1963, Mobil Oil, a company not involved in the controversy here, extended its pipeline into the Camrick area from the north.

The area to the east of these lines, in Texas and Oklahoma was undeveloped. Thereafter, beginning in 1963, fields were developed in this eastern area, in Beaver County, Oklahoma, and in Lipscomb County and in the north part of Hemphill County, in Texas.

By August 1963, Shamrock had extended its pipeline eastward into this new area in Lipscomb County to

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[3]By 1968, Shamrock had extended its line to southern Colorado to obtain oil for its refinery.

connect with the Frass and W. Follett fields. This was pre-Panotex.

During this year of 1963 the Panotex pipeline was conceived by Cameron and commitments from producers were being obtained. Primary equity financing was obtained in late 1963 from Alliance Business Investment Company. In February 1964 a loan was sought from the Houston bank. This effort was unsuccessful and financing was sought and obtained in New York in July 1964. Panotex came into corporate existence in July 1964, its line was commenced in October 1964 and became operative in January 1965.

Meanwhile, as Cameron's president discovered in 1963, Phillips was soliciting commitments from purchasers in 1962 in the Oklahoma part of the Texas-Oklahoma area where Cameron began solicitations in 1963. These solicitations were for production as far east as the Logan area in Beaver County, Oklahoma. Phillips had considerable production of its own in the Como area and was trucking six to seven thousand barrels of oil per day from there to Camrick. This oil amounted to approximately ten per cent of the capacity of Phillips' refinery.

Cameron testified that he began looking at this area after his Camrick trucking operation declined in 1961. His idea was that new pools of oil would be developed in this eastward territory in Beaver and Lipscomb Counties and this proved to be the case in the next few years.

This brings us to the relevant markets. Plaintiffs tried the case on the theory of three relevant markets. We will consider the case on that basis and without determining the correctness of the delineation.

Area I, according to plaintiffs' theory of suit, is the Camrick area, heretofore described. It was served by Phillips' pipeline beginning in 1961 and by Mobil beginning in 1963. Panotex has never entered this market.

Area II is south Beaver County and mainly the Balko, Elmwood and Como fields in that county. Phillips extended its pipeline east through the Balko and Elmwood fields and to Como in September 1964. Panotex constructed its line westward through these fields in January 1965. Prior to these extensions, Cameron and Phillips were advised of what the other proposed to do.

Shamrock served neither Area I or II by pipeline. Phillips does not serve Area III. Area III consists of the Logan field in Beaver County, Oklahoma and all of Lipscomb County, and the Feldman field in Hemphill County, Texas. It is served by Shamrock and Panotex. The Panotex line began at the Shell pipeline at Elk City in Beckham County, Oklahoma, considerably southeast of the areas in question, and thence extended in a northwesterly direction into fields in Lipscomb and Hemphill Counties, Texas, namely the Feldman, West Higgins, Kelln and Mathers field. It is to be noted that Panotex had a monopoly in these fields until 1968 when Shamrock entered Kelln and West Higgins. The Cranford, Bishop and West Durham fields had

been developed along the line of Panotex by 1968 and were served exclusively by Panotex.

The line of Panotex continued northwesterly to reach the Lipscomb and Bechthold fields in Lipscomb County, Texas, and the Loan field in Beaver County, Oklahoma. It appears that Shamrock reached the Lipscomb field in August 1963 and extended to the Logan and Bechthold fields in August 1964. Shamrock, prior to its extension and the entry of Panotex, had been purchasing oil from the Logan area from a trucker who served the area.

The Case Against Phillips and its Subsidiary

The issue presented is the foreclosing or restriction of a competitor, Cameron-Panotex. The claim is premised on conduct of Phillips, acting alone or in league with its pipeline subsidiary or with Shamrock.

We begin by eliminating Area I. Panotex is not in Area I. Phillips has been there since 1961. Cameron-Panotex makes no case whatever from a factual standpoint on being foreclosed from or restrained in Area I, either through an attempted monopoly or by way of a restraint. The facts at best show only that Area I had no pipeline service until 1961 when Phillips entered. There is no evidence that Cameron-Panotex ever considered entering Area I after the entry of Phillips. The evidence demonstrates no more than a normal business venture on the part of Phillips in entering Area I (Camrick). The issue narrows to Areas II and III.

Area II consists of only three fields, Balko, Elmwood and Como. They are served by Phillips and Cameron-Panotex. Phillips extended east from Area I in September 1964 and Panotex commenced service in January 1965. Phillips had solicited commitments in Area II in 1962 according to Cameron. It was trucking oil out of the area and had production of its own on 16,000 acres of leases in the Como area. Phillips also solicited in the Logan field in Area III. Cameron began solicitations in the area in 1963. There was no previous pipeline service to Area II. Phillips had little success in obtaining commitments.

The evidence disclosed that plaintiffs were purchasing 100 per cent of the Balko production, most of the Elmwood production, fifty per cent of the Como production (Phillips had some production), and all of the Logan production except for one producer. This was the situation immediately upon the completion of the Panotex line and plaintiffs obtained all of the oil that was committed to them. In the ensuing years, Panotex has obtained all new production in Area II and at Logan. Phillips has not connected to a new lease since 1964.

When Cameron announced in 1964 that it had received financing, Phillips met Cameron's price and contract terms. Its prior offers had been higher and its contract terms more stringent. In addition, Phillips agreed with its pipeline subsidiary to guarantee it a seven per cent return on investment as a condition of a pipeline extension into Area II. The commitments of Phillips, according to plaintiffs, were insufficient

to produce such a return. It does appear that the commitments were less than the number theretofore insisted upon by the Phillips pipeline subsidiary. There is no proof, however, that the extension was unprofitable and thus something from which an inference of predatory conduct could be drawn. In meeting the Panotex competition, Phillips took three simultaneous steps: (1) it met Cameron's price offer; (2) it met Cameron's contract requirements as to period of contract; (3) it guaranteed its pipeline subsidiary a seven per cent return so as to replace its trucking operation with a pipeline. The proof stops here. It goes no further than to show that Phillips needed the oil for its refinery and would be preempted by the entry and consequent monopoly of another pipeline. It is true that the evidence shows that Phillips considered Area II as "its own backyard" and sought to protect its position in the area. This, however, amounts to nothing more than a proper business motive under the circumstances. Cf. *Times-Picayune Publishing Company v. United States*, 1953, 345 U.S. 594, 627, 73 S.Ct. 872, 97 L.Ed. 1277, on the necessity to prove something more than a "step predominantly motivated by legitimate business aims ..." to show an intent to monopolize.

At this point we find that the evidence of a conspiracy between Phillips and its pipeline subsidiary is nonexistent from the point of showing a violation of §§ 1 or 2 of the Sherman Act.

This is likewise true as to showing an attempt to monopolize on the part of Phillips. Assuming *arguendo*, intent and a relevant market, a dangerous probability

of success is clearly lacking. See *Cliff Food Stores, Inc. v. Kroger, Inc.*, 5 Cir., 1969, 417 F.2d 203, 206-08.

The action of Phillips in extending into Area II did not rise above a protective motive. Phillips was already present through a trucking operation and through its own production. Panotex was transporting in another direction and away from Phillips' refinery. Protection of its refinery by the assurance of some of the oil reserves in Area II was no more than a normal business practice absent conduct calculated to bar the entry of a competitor into Area II or to drive a competitor out of the area. The proof disclosed no such conduct on the part of Phillips. There was no proof of predatory conduct or of conduct which was illegal per se. It follows that the proof was insufficient to make a jury question as to a restraint of trade by Phillips from the conduct disclosed to this point.

Plaintiffs urge that Phillips violated the Sherman Act by allegedly blocking Cameron's application for a loan from the Houston bank with which to construct Panotex. The Chairman of Phillips happened to be a director of the bank. Phillips had been a long time large depositor in the bank. The other side of the coin is that the loan was never formally rejected although some five months of negotiations took place. The bank was troubled by the probability of success of the venture, considering competitive pipelines in the proposed Panotex area and the status of Cameron's commitments. There is no evidence that Phillips influenced by word or deed the decision not to make the loan. There the matter ends. A Phillips officer on the bank

board and a Phillips deposit in the bank will not suffice as a base for an inference of loan influence and in turn, for an inference of an antitrust violation. The bank sent a consultant to discuss the prospects of Panotex with Phillips and Phillips advised that it intended to compete for the oil. This was a business judgment in line with the needs of its refinery. Phillips was not willing to give up the area where it competed to Panotex.

There is one other charge against Phillips and it stems from an alleged division of markets as between Shamrock and Phillips. This will be considered following the discussion of the case against Shamrock.

The Case Against Shamrock and Its Subsidiary

There is no evidence that Shamrock conspired with its pipeline to restrain trade or to monopolize. The competing lines were simply built either prior to the entry of Panotex or after the entry of Panotex. The subsidiary pipeline did no more than build lines, set prices and make purchases. Shamrock's prices were uniform throughout the Shamrock system except in one instance. This one instance occurred for a short time in the Logan and Bechthold fields. Shamrock first attempted to pay producers a price less than that paid by Cameron. When Cameron obtained commitments from eighty per cent of the producers, Shamrock raised its net offer to the producers. After this price increase, Shamrock's price, while exceeding that of Cameron by two cents per barrel, was uniform with its prices throughout the remainder of its system.

Moreover, Cameron had contracts with its producers to hold them providing it met the prices of others.

The competition between Panotex and Shamrock was all in Area III. By and large, as stated, Shamrock was in this area prior to the entry of Panotex and, like Phillips, was seeking oil for its refinery. There is no evidence that the conduct of Shamrock or its subsidiary exceeded a protective position. It competed with Panotex for oil but without predatory action. It engaged in no conduct which can be described as illegal per se under the Sherman Act. The proof is clear that there was no dangerous probability of a monopoly.

We conclude that the evidence was insufficient to make jury issues on the charges against Shamrock to this point.

The Alleged Phillips-Shamrock Conspiracy

The proof was that Phillips and Shamrock had been competing in the general area involved for more than 40 years. There was evidence as to specific examples of competition between them. Plaintiffs' case, however, comes down to evidence of a elephone conversation between Phillips and Shamrock, made to Phillips by Shamrock in 1964, wherein Shamrock inquired whether Phillips had any interest in extending into the Logan area. Phillips answered that it did. Shamrock replied that it too would also have to go into Logan and that "it won't be the first time we have been competitors."

Plaintiffs make much of the fact that Shamrock extended to Logan and Phillips did not. Phillips went no further east than the Como field in Area II while Shamrock went no further west than Logan. Standing alone, this might give rise to an inference of a division of markets between Phillips and Shamrock to the detriment of their mutual competitor, Panotex. But this evidence does not stand alone.

Phillips had been seeking commitments in the Logan area without success. Panotex had every producer in the field except one. Shamrock acquired that one. The interest of Phillips was such that it staked a right of way into Logan but abandoned the prospect for lack of business.

Phillips had production of its own in the Como field and some additional suppliers. These facts gave good reason for Phillips to stop at Como and for Shamrock to stop at Logan. They established a basis for a business judgment resting on the idea that a certain amount of production was necessary to warrant the expense of extending the pipelines. Any inference of a division of markets must give way to these facts.

This case began in 1964. It has been strenuously developed through discovery and otherwise. It occupied more than two weeks of trial time. In the end there is no substance to plaintiffs' claims. Under the test of viewing the evidence in the light most favorable to plaintiffs and giving them the benefit of all inferences which might reasonably be drawn from estab-

lished facts, we have nothing more than competition between the parties.

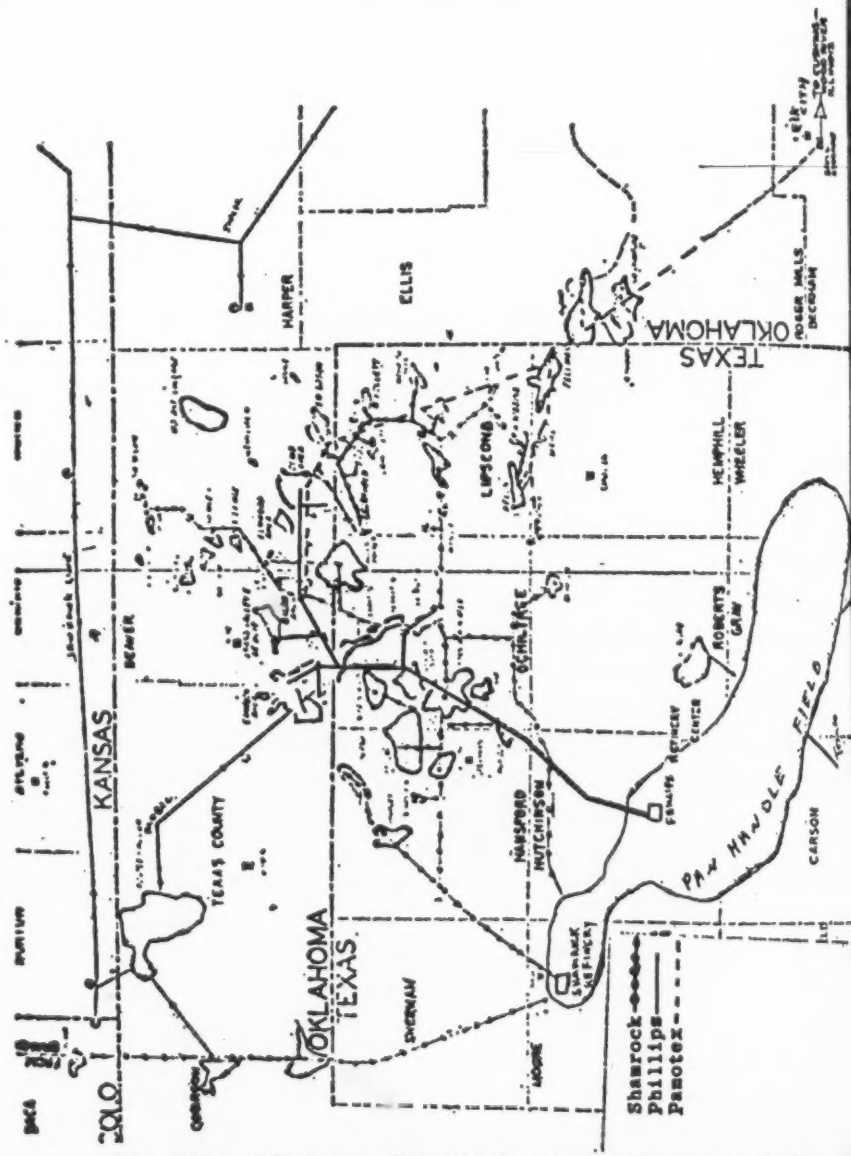
It seems implicit in plaintiffs' position that they view the law as protecting them from competition, whether from those already in the market or from newcomers to the market. This is not the law, and the fact that a pipeline can be a natural monopoly does not mean that it is protected from competition. The Sherman Act fosters competition by protecting it from illegal restraints and monopoly power. *Northern Pacific Railway Company v. United States*, 1958, 356 U.S. 1, 4-5, 78 S.Ct. 514, 2 L.Ed. 2d 545. Plaintiffs, of course, are protected to this extent. However, after having considered all of the evidence and every contention made by plaintiffs, we find no evidence of an illegal restraint or of a proscribed attempt to monopolize on the part of defendants, individually or collectively. The record is one of allowable competition — nothing more.

We hold that the district court did not err in directing verdicts for Phillips and Shamrock.

AFFIRMED.

PANOTEX v. PHILLIPS PETROLEUM CO.

APPENDIX "A"



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